132-112

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. ~~944.~~ 77

JOHN B. ANTHONY, PLAINTIFF IN ERROR,

vs.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED SEPTEMBER 16, 1886.

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No. 344.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

INDEX.

	Original.	Print.
Writ of error	1	1
Return to writ	2	1
Citation and proof of service of same	3	2
Caption	5	2
Petition	5	3
Summons	7	4
Marshal's return	8	4
Answer	8	5
Replication	9	5
Case called	10	6
Case further heard	11	6
Judgment	11	6
Bill of exceptions filed	12	7
Bill of exceptions	12	7
Evidence for plaintiff	13	8
Testimony of J. B. Anthony	13	8
Dr. Mudd	20	12
Dr. E. M. Powers	22	14
David M. Read	24	14
Gustav Radeke	30	19
James Lewis Pierce	38	24
Mary B. Anthony	42	27
Benjamin F. Thurston	43	27

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	Original.	Print.
Evidence for defendant	46	29
Stipulation as to testimony	46	29
Testimony of R. H. Terhune	47	30
H. S. Smith	60	39
Lee Howell	65	42
Charles O. Parker	66	42
C. R. Barnhart	85	55
V. S. Albitz	93	61
Thomas Fincher	110	72
Irwin Carr	115	76
Charles Crowder	121	80
T. C. Judd	125	83
W. Newton	127	84
Nicholas Moose	129	86
William Mitchell	137	91
Thomas Lancey	144	97
Patrick Meyer	148	99
T. B. Robinson	160	108
Evidence for plaintiff in rebuttal	172	116
Testimony of Adam Gurdiman	172	116
W. C. Hesse	179	121
Evidence for defendant in rebuttal	183	124
Testimony of Simon Strauss	183	124
Plaintiff's instructions refused	184	125
Charge to the jury	186	126
Motion for new trial	189	127
Appeal allowed	190	128
Affidavit of F. M. Weaver	192	128
Appeal bond	193	129
Clerk's certificate	195	129

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the March term, 188–, thereof, between John B. Anthony, plaintiff, and The Louisville and Nashville Railroad Company, defendant, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this fourth day of June, in the year of our Lord one thousand eight hundred and eighty-six.

Issued at office, in the city of St. Louis, with the seal of the circuit court of the United States for the eastern district of Missouri, dated as aforesaid.

{ Seal of the United States Circuit Court, Eastern District of Missouri. }

A. P. SELBY,
Clerk Circuit Court United States, Eastern District of Missouri.

Allowed by—
SAMUEL TREAT, *Judge.*

2 [Endorsed:] No. 2547. United States circuit court, eastern district of Missouri. John B. Anthony *vs.* Louisville & Nashville Railroad Co. Writ of error to the circuit court of the U. S., east. dist. of Missouri. Returned and filed 4th day of August, 1886. A. P. Selby, clerk.

Return to Writ.

UNITED STATES OF AMERICA, *Eastern District of Missouri,* } *ss:*

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said circuit court, at office, in the city of St. Louis, this fourth day of August, A. D. 1886.

{ Seal of the United States Circuit Court, Eastern District of Missouri. }

A. P. SELBY,
Clerk of said Court.

3 The United States of America to the Louisville and Nashville Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Missouri, wherein John B. Anthony is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel Treat, judge of the circuit court of the United States for the eastern district of Missouri, this 4th day of June, in the year of our Lord one thousand eight hundred and eighty-six.

SAMUEL TREAT,
Judge United States District Court, Eastern District of Missouri.

4 [Endorsed:] United States circuit court, eastern district of Missouri. John B. Anthony *vs.* Louisville & Nashville Railroad Co. Citation. Filed June 4th, 1886. —— ——, clerk.

Service of the above citation acknowledged this June 21st, 1886.
HENRY W. BENET,
Att'y for Louisville & Nashville R. R. Co.

5 UNITED STATES OF AMERICA, *Eastern District of Missouri,* } *ss:*

In the Circuit Court of the United States in and for said District.

Be it remembered that on the third day of August, A. D. 1885, there was filed in said court a certain petition in words and figures following, to wit:

Petition.

UNITED STATES OF AMERICA, *Eastern District of Missouri,* } ss:

In the Circuit Court of the United States, Eastern District of Missouri. September Term, 1885.

JOHN B. ANTHONY

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Plaintiff states that he is a citizen of the State of Rhode Island.

That the defendant is a corporation and citizen of the State of Kentucky and having its principal place of business therein.

Plaintiff, for his cause of action against the defendant, states that at the time hereinafter mentioned the defendant was a corporation duly incorporated under the laws of the State of Kentucky, was the owner of a certain railroad known as the Louisville & Nashville railroad, together with the tracks, cars, locomotives, and other appurtenances thereto belonging, and was a common carrier of
6 passengers thereupon for hire between the places hereinafter mentioned.

That on the 23rd day of October, 1883, he was a passenger on the defendant's line of railroad for the purpose of being conveyed thereon to the city of St. Louis, State of Missouri; that he was going from Louisville, Kentucky, to said city of St. Louis, and paid said defendant for such service in conveying him to said city on its said line of railroad the usual and customary charge.

That while he was such passenger, on the 23rd day of October, 1883, the track used by defendant's road about three and a half miles east of East St. Louis, Illinois, was defective and unsound and unfit to be used for that purpose, which the defendant might and would then and theretofore have known by due care, but not regarding its duty it negligently suffered it to be used, and while the car used by the defendant to convey the plaintiff was proceeding with said plaintiff therein on said defective and unsound track it was, by reason of said defect and unsoundness and the negligence of the defendant and its servants, thrown from the track and the plaintiff was bruised and wounded and otherwise injured.

That by reason thereof the plaintiff became and was for a long time ill; was obliged to and actually did expend the sum of eight hundred (800) dollars in medical and other treatment and attendance in attempting to cure and caring for himself; that he was unable to attend to his business, and may be unable to actively pursue his business hereafter, to his damage in the sum of twenty thousand dollars, for which sum he demands judgment and for his costs.

NATHAN FRANK,
Attorney for Pl'ff.

7 Upon the filing of said petition there was issued a summons, which, with the marshal's return thereon, is in words and figures following, to wit:

Summons.

UNITED STATES OF AMERICA, } *sct:*
Eastern District of Missouri, }

In the Circuit Court of the United States in and for said District.

The President of the United States of America to the marshal of the United States in and for said district, Greeting:

You are hereby commanded to summon Louisville & Nashville Railroad Company, a citizen of the State of Kentucky, that it be and appear before the honorable circuit court of the United States in and for the eastern district of Missouri on the first day of the next term thereof, to be holden at the city of St. Louis, in and for said district, on the third Monday of September next, then and there to answer the complaint of John B. Anthony, a citizen of the State of Rhode Island, as set forth in the petition filed in said court on the third day of August, A. D. eighteen hundred and eighty-five.

Hereof fail not, and have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 3rd day of August, A. D. eighteen hundred and eighty-five.

Issued at office, in the city of St. Louis, under the seal of said circuit court, the day and year last aforesaid.

[SEAL.] A. P. SELBY, *Clerk,*
By T. L. CRAWFORD, *Deputy.*

8 *Marshal's Return.*

UNITED STATES OF AMERICA, } *sct:*
Eastern District of Missouri, }

I return on this writ that I executed the same on the 3rd day of August, A. D. 1885, by delivering a copy of the same, with a copy of the complaint attached, to John W. Mass, the assistant gen'l passenger agent of the said Louisville & Nashville Railroad Company, the defendants herein named, and the person in charge of the office of said defendants at St. Louis, in above district.

J. E. D. COUZINS,
United States Marshal, Eastern District of Missouri.

And afterwards, to wit, on the 14th day of October, A. D. 1885, there was filed in said cause an answer in words and figures following, to wit:

Answer.

UNITED STATES OF AMERICA, } ss:
Eastern District of Missouri, }

In the Circuit Court of the United States for the Eastern Dist. of Missouri.

J. B. ANTHONY, Pl't'f,

vs.

LOUISVILLE AND NASHVILLE R. R. Co., Def't.

The defendant comes, by attorney, and, for answer to plain-
9 tiff's petition in the above-styled cause, denies each and every allegation or statement in said petition contained.

For a further defense and answer to said petition defendant says that on or about the 23rd of October, 1883, about three and one-half miles from the city of East St. Louis, State of Illinois, a train of cars, hauled by its locomotive over its road-bed were thrown therefrom by reason solely of a latent or hidden defect or flaw in the interior or body of a steel rail laid in the track on said road-bed.

That no outward inspection or observation could discover or detect said defect or flaw for the reason that said steel rail on its surface was apparently perfect and without defect and in all respects adapted to the uses to which it was put.

That said steel rail containing said flaw or defect by reason thereof was fractured while said locomotive and train of cars was passing over said rail, and thereby the sleeping car, being the last coach in said train, and one passenger coach immediately in front of it, were thrown from the track. All the other portion of said train, consisting of the locomotive, tender, the baggage cars, three passenger coaches, and one sleeping coach, passed over said rail in safety and were not thrown from the track.

HENRY W. BOND,
Attorney for Defendant.

And afterwards, to wit, on the 15th day of March, A. D. 1886, there was filed in said cause a reply in words and figures as follows, to wit:

Replication.

Circuit Court of the United States for the Eastern District of Missouri.

10 JOHN B. ANTHONY, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Now comes plaintiff and, for reply to the new matter set up in defendant's answer, denies each and every allegation thereof and asks

for judgment for twenty thousand dollars and costs, as prayed for in his petition.

NATHAN FRANK,
Att'y for Pl'tff.

And afterwards, to wit, on the 26th day of March, A. D. 1886, the following, among other, proceedings were had and appear of record in said cause, to wit:

Case Called.

J. B. ANTHONY, Plaintiff,
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Defendant. } 2547.

Now comes the parties, by their attorneys—the plaintiff by Nathan Frank and the defendant by Henry W. Bond—and the defendant files motion and affidavit for continuance herein, which motion, being by the court considered, is overruled; and this case being now regularly called for trial, it is ordered that a jury come, and thereupon come said jury, to wit, F. M. Gifford, Dabney Bowles, J. G. Depoyster, Curtis Rainier, Luther Armstrong, Henry S. Carroll, W. A. Suell, W. W. Kirkpatrick, J. A. Seigelman, Isaac Hockaday, J. B. Price, and W. B. Elliott, twelve good and lawful men, duly empaneled and sworn to well and truly try the issues joined herein, and thereupon the hearing of this cause was proceeded with; but not being concluded at the hour of adjournment, it is ordered
11 that further proceedings herein be continued until to-morrow morning.

And afterwards, to wit, on the 27th day of March, A. D. 1886, the following further proceedings were had and appear of record in said cause, to wit:

Case Further Heard.

JOHN B. ANTHONY, Plaintiff,
vs.
LOUISVILLE AND NASHVILLE RAILROAD CO., Defendant. } 2547.

Now again come the parties, by their attorneys, and the jury, as on yesterday, and the hearing of this cause was resumed; but, not being concluded at the hour of adjournment, it is ordered that further proceedings herein be continued until to-morrow morning.

And afterwards, to wit, on the 29th day of March, A. D. 1886, the following further proceedings were had and appear of record in said *court*, to wit:

Judgment.

JOHN B. ANTHONY, Plaintiff,
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Defendant. } 2547.

Now again come the parties, by their attorneys—the plaintiff by

Nathan Frank and the defendant by Henry W. Bond—and also come the jury as on yesterday, to wit, F. M. Gifford, Dabney Bowles, J. G. Depoyster, Curtis Rainier, Luther Armstrong, Henry S. Carroll, W. A. Suell, W. W. Kirkpatrick, J. A. Seigelman, Isaac Hockaday, J. B. Price, and W. B. Elliott, who, after hearing the evidence and arguments of counsel and receiving the charge of the court, return the following verdict:

"We, the jury in the above-entitled cause, find for the
12 defendant.

"J. B. PRICE, *Foreman.*"

It is therefore considered by the court that the plaintiff take nothing by his writ herein; that the defendant, The Louisville and Nashville Railroad Company, go hence without day and recover of the plaintiff, John B. Anthony, its costs herein expended, and that a fee bill of execution issue therefor.

And afterwards, to wit, on the 17th day of May, A. D. 1886, the following further proceedings were had and appear of record in said cause, to wit:

Bill of Exceptions Filed.

J. B. ANTHONY, Plaintiff,
vs.
LOUISVILLE AND NASHVILLE RAILROAD CO., Defendant. } 2547.

Now comes the plaintiff, by attorney, and presents to the court his bill of exceptions, which is allowed, signed, and ordered to be filed and made part of the record herein.

Said bill of exceptions is in words and figures following, to wit:

Bill of Exceptions.

In the United States Circuit Court.

J. B. ANTHONY
vs.
LOUISVILLE & NASHVILLE R. R. CO.

Be it remembered that the above-entitled cause came on for hearing before his honor Judge Treat and a jury in the circuit court of the United States in and for the eastern district of Mis-
13 souri, St. Louis, Missouri, on the 26th day of March, 1886, when the following proceedings were had:

Appearances: Messrs. D. P. Dyer and Nathan Frank, for plaintiff; Henry W. Bond, for defendant.

The plaintiff, to sustain the issues on his part, offered evidence as follows:

J. B. ANTHONY, being duly sworn in his own behalf, testified as follows:

Direct examination by N. FRANK, Esq.:

Q. State your name.
A. My name is John B. Anthony.
Q. You are the plaintiff in this suit?
A. I am.
Q. You are a citizen of Rhode Island?
A. I reside at Providence, Rhode Island.
Q. A citizen of that State, are you?
A. I am, sir.
Q. What business were you engaged in in October, 1883?
A. In October, 1883, I was treasurer and general manager of the Household Sewing Machine Co., located at Providence.
Q. Did you make a journey from Providence in October, 1883; and if so, from what point to what point?
A. I made a journey in October, 1883, leaving Providence early in that month.

THE COURT: It is not denied that the gentleman left there during that month and met with an accident; the only question is as to whether there was any negligence on the part of the company.
COUNSEL FOR PLAINTIFF: And the extent of the injury.
COUNSEL FOR DEFENDANT: Yes, sir; it is admitted that the plaintiff was injured while a passenger on defendant's road, and the question is as stated by the court.

Q. State, Mr. Anthony, when you discovered or learned or found out that you had been injured as a passenger on board a Louisville & Nashville Railroad train. State what it was, what was
14 your condition when you came to realize your condition.
A. On the morning of the 23rd of October, as the train was approaching East St. Louis—the exact distance from East St. Louis I know nothing about—I was aware of the car in which I was seated being thrown from the track, and, as I felt myself flying in the air, I knew that something had happened, but *to* the extent of the injury I had sustained I knew nothing whatever until a considerable length of time afterwards. I think the first recollection I had of anything after the accident was that persons were standing over me and doing something I scarcely know what. I realized then that I had met with an accident; that, perhaps, was in the car in which I was being conveyed to St. Louis from the point of the accident.
Q. It was not the car that was capsized?
A. No, sir; it was some other car I was in.
Q. Well, what were the nature of your injuries, as you learned them afterwards?
A. I was conveyed to the Southern Hotel, in St. Louis, and then I began to realize my condition, that I was seriously injured about the head and face and bruised somewhat about the body. I was attended by physicians there, and I think also by physicians who

came to the scene of the wreck. I was taken to the hotel I remained at the hotel in St. Louis about 10 days. I was attended there by friends who came to me, and I afterwards succeeded in reaching my home.

Q. Now, will you state the nature of the injuries that you discovered at the time you was at the hotel on account of this accident?

A. My injuries were cuts on the head—on the top of the head—two or three in number. I was not aware at the time of the accident of them, and, in fact, knew little about it, except what was told me later. My lip was cut also and it was sewed up. I was
15 otherwise bruised. My head was sewed up in several places. I was entirely incapacitated for work.

Q. How about your nose?

A. My nose was injured. I was told at the time it was broken.

COUNSEL FOR DEFENDANT: Never mind what you was told.

Q. How long did you remain at the hotel or were you obliged to remain there under treatment?

A. I was in great haste to get away, but I remained there, according to my hotel bill, 9½ days. As I remember, it was about 10 days; my hotel bill shows 9½ days.

Q. Then you proceeded on your journey homeward, did you?

A. I did, sir; an attendant was secured for me who attended to my wants and provided for my comfort as much as possible.

Q. An attendant accompanied you?

A. Yes, sir; as far as Cleveland, at which point I was met by another gentleman, who had come out from Providence, and the one who started from here then left me, and I was accompanied from that point by a personal friend.

Q. State the name of the gentleman who attended you at the Southern.

A. I was attended by Drs. Powers & Mudd, of this city.

Q. Now, after your return to your home, at Providence, you may state to the court and jury how long you were confined to your home by your condition and under the care of physicians.

A. I had serious difficulty in the journey home. I had very great anxiety to get home, and when I got there I was attended by a physician and confined to the house several weeks, not being able to go out at all, and afterwards I began to get out a little; but for a number of months I was unable to attend to any matter of business of any kind of any importance.

Q. And as to your general health at that time, what was
16 your condition, physically and mentally?

A. Previous to that time, I think, I was a very sound, healthy, strong man, but for a long time afterwards I was very much weakened, but gradually recovered my strength, though I have never considered myself as healthy and as sound a man as I was before.

Counsel for defendant objected to what he considered.

The COURT: Proceed and explain.

Witness continuing: I have never considered myself as sound and as healthy a man since the accident as I was before.

Q. State to the court and jury the difference since the accident and before with respect to your powers of endurance and vigor.

A. I think I can state with absolute certainty that my memory has been considerably impaired; I know that from observation in connection with business affairs, and I know that my powers of endurance, physical or mental, are not equal at all to what they were before.

Q. Now, with respect to your business affairs, for how long a time were you incapacitated for attending to your duties in connection with your position there?

A. I have never taken on the same duties or duties to the same extent since that time. While I was still here in St. Louis an assistant treasurer of the corporation was elected, and in the following Feb. that assistant was made treasurer, so that I have never performed the duties of that office since the time of my accident.

Q. Who paid the expenses, Mr. Anthony, while you were at the hotel?

A. All expenses, so far as I know, were paid by the Co. that I represented and stands on the books against me.

Q. That is, you paid the expenses?

A. Yes, sir; the company telegraphed to its agent here, instructing him to pay all the expenses and be careful that everything was done that was possible.

17 Q. That is, the Household Sewing Machine Co. telegraphed that?

A. Yes, sir.

Q. And that is charged to you?

A. Yes, sir.

Q. You paid all the expenses?

A. Yes, sir.

Q. To what expense have you been, Mr. Anthony, on account of these injuries?

A. The account standing on the books of the Household Sewing Machine Co. at the present time amounts to 750 odd dollars.

COUNSEL FOR DEFENDANT: We don't like to be captious, but we object to all this matter.

Q. What were the amounts of expenses as the Southern Hotel for your physicians and medicines?

A. And my attendants and all such expenses as came from this accident amount to 750 odd dollars and some cents, if I remember rightly.

Q. You had a physician in Providence; what was his name?

A. Dr. Radieve; he attended me in Providence on my arrival and did so for about two months.

Q. You paid him?

A. Yes, sir.

Q. How much?

A. His bill was $130.

Q. Do you know the amount of Dr. Powers' and Dr. Mudd's bill?

A. I can tell by referring to the bill. It was about the same sum, I think; I don't know precisely. (Examines bill.) Drs. Powers and Mudd charge $135.

Q. The hotel bill—have you got that there?

A. The hotel bill was $135.40.

Q. Do you know whether the train you were upon was late when it reached Belleville on its way to St. Louis?

COUNSEL FOR DEFENDANT: Of your own knowledge.

Q. Was any statement made by any of the employees in charge of the train?

A. I was informed by those on the train——

COUNSEL FOR DEFENDANT: We object to what he was informed.

18 Witness continuing: I am very certain; I would not like to swear to a minute, but I am sure we were behind time.

Q. How much behind time?

A. As far as I was able to judge, half an hour.

Q. You may state whether or not the train was proceeding at a rapid or slow rate of speed.

A. I realized and believed at the moment of the accident that we were travelling rapidly.

COUNSEL FOR DEFENDANT: We except to that statement.

Witness continuing: I remember distinctly of being seated upon the edge of my seat, feeling a little uncomfortable at what I believed was an unusually rapid rate to travel under such circumstances.

Q. The marks produced by this catastrophe are still upon your head; they still appear there?

A. Yes, sir; I believe they do.

Q. And that has been 2½ years since?

A. Yes, sir; they are here on the top of my head.

Cross-examination by HENRY W. BOND, Esq.:

COUNSEL FOR DEFENDANT: I don't like to interrupt the witness, but the ground of our objections to his statements about his belief about the rate of speed was that there was no pretence in the allegations of that kind.

COUNSEL FOR PLAINTIFF: I said proceeding at a high rate of speed.

The COURT: The pivotal point, as I understand it, is simply whether it was caused by negligence of the company, this accident, or whether it was an accident that could not be averted or foreseen. This gentleman states that he thought it was traveling at a high rate of speed. That is an element for the jury to consider, that in order to make up lost time they were running a little more rapidly.

19 Counsel for defendant objected to its introduction and excepted to the ruling of court on the ground that it was not stated in the petition.

Q. How old are you?
A. I am in my 57th year.
Q. When was your last birthday?
A. The 1st day of October.
Q. On the 1st day of last October you were 57 years of age?
A. No, sir; I was 56.
Q. You are entering on your 57th year?
A. Yes, sir.
Q. Mr. Anthony, you have spoken something about $750 having been paid out. Did that include the Southern Hotel bill?
A. Yes, sir.
Q. Did it include those other bills that Mr. Frank has asked you about?
A. I think so.
Q. Who paid that money—whose money was it?
A. The Household Sewing Machine Co.
Q. How much is that sum total?
A. $756.90.
The COURT: Under what circumstances did they pay it?
A. I was the treasurer, or rather general manager, of the Co., and the Co. telegraphed to its agent here to pay all bills. I was then incapacitated. I knew nothing about the amount of money paid them.
Q. The company paid that money?
A. Yes, sir.
Q. You personally didn't pay it?
A. No, sir; it stands to my debit there.
Q. Have you ever paid that back to the company?
A. No, sir; I am under engagement to do so.

COUNSEL FOR DEFENDANT: Never mind, answer my question on cross-examination. Of course, you know your own counsel will let you get in what you want to inject afterwards.

Redirect examination by N. FRANK, Esq.:

Q. This amount is charged to you and you are under an obligation to pay that money?

Counsel for defendant objected to the question.

The COURT: The sum total of all the amounts paid is $756.90 for advanced by the company and charged to him?
COUNSEL FOR PLAINTIFF: That is it, your honor.

Dr. MUDD, being duly sworn on behalf of plaintiff, testified as follows:

Direct examination by N. FRANK, Esq.:

The COURT: Are you acquainted with this gentleman?
A. Yes, sir.
Q. You remember him?
A. Yes, sir.

Q. You were paid your bill?
A. Yes, sir.
Q. What was the extent of his injuries, do you remember?
A. I remember the scalp wound was an extensive one and he had some other bruises; those, with the shock, I think, were the chief injuries as I remember them.
The COURT: Did they affect him permanently?
A. I could not say; he recovered apparently very well.

The COURT: Then there is no permanent injury except the scar.

Q. What connection would that shock to his scalp have with reference to permanent injury with reference to memory?

Counsel for defendant objected to the question.
The COURT: Let the Dr. state.

A. The shock would be dependent upon the manner of the receiving of the blow and the instrument with which it was inflicted. I don't know enough about that to give a positive opinion of it. He might have had a much greater shock from a much smaller scalp wound than that he received, and *vice versa.*

Q. How much of a scalp wound was that?

21 A. As I remember the case, the shock was quite well marked during the first week or three days; the evidences of permanent injury were absent at that time—I mean he recovered promptly from that shock, and when he left here there was then not much evidence of a permanent injury. I don't know that the evidence that we had at that time would necessarily lead us to infer that there was any permanent injury other than the scar.

Q. You were the consulting surgeon?
A. Yes, sir.
Q. Dr. Powers was in charge of the patient?
A. Yes, sir.
Q. How long was this wound on the head?
A. Several inches. I don't remember how long.
Q. Was the bone bare?
A. The bone was denuded. The cut went to the bone, I think.

Cross-examination by HENRY W. BOND, Esq.:

Q. Mr. Anthony went home 8 or 9 days after the injury?
A. About that time.
Q. He recovered quite rapidly?
A. Yes, sir; made a good recovery.
The COURT: How long was it after he was injured before you saw him?
A. He came in the hotel one evening and I saw him the next morning in consultation.
The COURT: You saw him, on and off, for 9 days after that?
A. Yes, sir; but not regularly.
Q. Your bill and Dr. Powers' was $135?
A. I don't recollect the amount.

Q. You saw him before he started off?
A. Yes, sir.
Q. As far as you could detect, there was nothing to prevent his travelling or no permanent injury?
A. No, sir.
COUNSEL FOR PLAINTIFF: You have never seen him since?
A. No, sir.

22 Dr. E. M. POWERS, being duly sworn on behalf of plaintiff, testified as follows:

Direct examination by N. FRANK, Esq.:

Q. State your full name.
A. Edward M. Powers.
Q. How long have you been practicing medicine?
A. About 30 years.
Q. Do you remember of being called in at the Southern Hotel about October, 1883, to look after the injuries sustained by Mr. Anthony, plaintiff?
A. Yes, sir.
Q. Will you please state to the court and to the jury the condition in which you found Mr. Anthony when you were called in, and the extent of his injuries?
A. I can describe the injuries on the individual: the marks are there still. (Mr. Anthony steps up to the Dr. and his injuries are explained to the jury.)
Witness continuing: I found this gentleman suffering mostly from the shock at the time I met him. He was delirious and I regarded his condition as very serious. He had a lacerated wound that commenced here (indicating with finger). You may see the cicatrix, which still remain. The wound commenced at this point (indicating) and extended backwards; then descended obliquely downwards to the temporal region. He also had an incised lacerated wound of the lip; he also, when he recovered from the shock, when he became thoroughly conscious, complained to me of a pain in the right limb, although, if my recollection serves me right, this referred to some other point and was due to some injury in the spinal region, for I examined the limb and there was no evidence of any contusion—there was no evidence of any injury at the site of the pain—and
23 I attributed it to some injury to the nervous distributor to that part. He recovered very rapidly, and I think the recovery was very good.
Q. How long were you in attendance on him there, Dr.?
A. I think, sir, that when I was summoned to appear in this case I looked at the register at the hotel to see at what time I was called to see him. I was called to see him, I think, about 11 or 12 o'clock on the 23rd of October and he left the hotel, I think, on the 1st or 2nd of November?
The COURT: About 9 days?
A. Yes, sir; 9 or 10 days.

Q. Will you please state to the court and jury how deep these wounds were upon the head—whether the bone was bare?

A. Portions of the wound the bone was bare.

Q. What was the length?

A. You can see it on the scalp there; I have not measured it; it extended to the middle and then transversely downward.

Q. What did you do towards repairing the wound in the lip—was it sewed up?

A. Yes, sir.

Q. And the scalp wound—how about that?

A. We brought the edges in apposition and maintained them in apposition.

Cross-examination by HENRY W. BOND, Esq.:

Q. Dr., the recovery was rapid so that he could travel, was it not?

A. The recovery was rapid, although he traveled a little sooner than I should have desired him; but he was so anxious to see his family that I deemed it prudent to let him go home.

Q. And understanding his case as you did, and the prompt recovery, you let him go?

A. Yes, sir.

Q. How much did you charge?

A. I don't recollect; it was $140 or $150.

The COURT: That included Dr. Mudd's?

A. No, sir; I think not.

24 Q. Were your bills separate?

A. Yes, sir. I am not sure about that, but I think it was about $140.

The COURT: I understood from previous testimony that you yourself and Dr. Mudd together charged about $135.

A. Well, sir, I cannot be positive about that. I can see the bill and can ascertain that when I go to my office; but I think it was something about that; perhaps that was the amount.

Counsel for plaintiff read in evidence depositions of David M. Read, Gustav Radeke, J. L. Pierce, M. B. Anthony, B. F. Thurston. Said depositions are in words and figures following, to wit:

DAVID M. READ, a witness of lawful age, being produced, sworn, and examined on the part of the plaintiff, deposeth and saith:

Int. 1. What is your name, age, residence, and occupation, and are you acquainted with the plaintiff in this case?

Ans. David M. Read; age, 53; residence, Bridgeport, Connecticut; occupation, merchant and manufacturer. I am acquainted with the plaintiff in this case, and have been since October 23, 1883.

Int. 2. Were you or not in the company of Mr. Anthony on said 23rd day of October, 1883? If yea, where and under what circumstances?

Ans. I was. I purchased a sleeping-car ticket for a section on the Louisville & Nashville railroad in Louisville on the 22nd of that month. Upon occupying that section I saw Mr. Anthony take the

section opposite, recognizing him from having seen him at the table of the Galt House, in Louisville. I had some general conversation with him that evening, and on rising the next morning we passed the compliments of the day and had some general conversation.

25 Int. 3. On which side of the car was Mr. Anthony sitting with reference to the forward end of the car?

Ans. On the right, looking toward the forward end of the car.

Int. 4. Did anything happen to said train on which you and Mr. Anthony were? If yea, state particularly in narrative form.

Ans. Yes. About *about* half past seven in the morning, as we were between Belleville and East St. Louis, I felt the sensation of the car which we occupied being off of the track and bounding over the ties. At the same moment this car was thrown over upon its side and dragged a short distance in that position—I don't know how far. I was thrown over onto the side of the car, being buried somewhat in the furnishings or debris that came from the other side—the upper side. The car, having been thrown from the track on the left hand, was tipped over to the left and I was on the down side. The first person or thing, as I raised myself up, that I encountered was Mr. Anthony. I have a recollection of seeing him as he was thrown over me and struck the car. I raised up and took hold of him and he was bleeding very profusely from the head, covering my head and clothing with his blood. He rushed forward and I with him for a certain distance. We were not far from the end of the car. In the meantime, the door having been pried open by a passenger, Mr. Anthony went through the door. After a very short time I followed and saw Mr. Anthony sitting on the bank near the track, where he apparently had crawled after going out of the door. He was very near the end of the car. As quick as I discovered him I called a man; I don't know who he was. We raised him up and with the assistance of some others lifted him into the rear car, which was left standing upon the track, and laid him out upon the rear seat of the car. By the assistance of my wife and another lady we bound his head as tightly as we could with towels to stop the

26 flow of blood. At that time he was so much exhausted that I was frightened—we were all frightened—and supposed he was dying. I gave him a potion of whiskey, and soon after some quinine pills. He afterwards revived a little and spoke of his wife and children, and then again was deranged and nervously violent; then again he awoke out of his stupor and asked where he was and where he came from.

This occurred in the car while the engine had gone to East St. Louis, said to be a distance of about six miles, I believe, to procure surgeons, which caused a delay on the track, to the best of my recollection, of an hour and a half, of which action I complained at the time, saying that the railroad officials should have known more of the state of the injuries before taking such action and should have hurried us into St. Louis.

After the engine returned with the surgeons from East St. Louis they were still delaying the train by holding it there while dressing

small wounds. I appealed to the conductor, saying that I thought the delay was unnecessary, and that Mr. Anthony would die if he did not start the train immediately. He took action on my appeal and did start the train very soon. Mr. Anthony remained in about the same condition until we arrived in St. Louis. A carriage being procured, he was taken in the carriage to the Southern Hotel. During the ride in the carriage he was very excitable, frantic, and wild, and upon arriving at the hotel he was completely exhausted, so much so that we feared we should not be able to get him to his room alive; but after giving him more stimulants we got him to his room and onto the bed.

27 In the meantime I had telegraphed to his agent in St. Louis from East St. Louis and he met us at the hotel. A surgeon connected with the hotel, I believe, Dr. Powers by name, I think, was first called to attend him. Afterwards we sent for Dr. Mudd.

Int. 5. What were the visible injuries sustained by Mr. Anthony at this time?

Ans. A very severe scalp wound and a cut on and near the lip, and one of his eyes at that time apparently injured; it was swollen and discolored.

Int. 6. How severe was the hemorrhage from his wounds?

Ans. He bled so profusely that I didn't suppose it possible for a man to live after sustaining that loss of blood.

Int. 7. You speak of the engine, after the accident, leaving the train and going to East St. Louis. State whether or not there was anything to prevent the wounded being put aboard of a car and taken directly away from the wreck to St. Louis.

Ans. In my judgment there was not.

Int. 8. During all the time intervening between the departure of the engine and its return were or not Mr. Anthony's wounds bleeding freely?

Ans. They were bleeding freely; they were bound up and the clothes were changed, but they were all the time bleeding.

Int. 9. When you speak of the rear car, into which Mr. Anthony was put, do you mean the rear car of the train or the rear car of those which remained upon the track in front of the wrecked cars?

Ans. The rear car of the ones that remained upon the track.

Int. 10. After Mr. Anthony was removed to the Southern Hotel did you remain there with him; and, if so, how long?

Ans. My hotel bill calls for three days and a third. I was there in town a little longer than that.

Int. 11. During the time which you were there state how much, if any, attention you gave to Mr. Anthony.

Ans. My wife or myself was with him or attending him most of the time.

28 Int. 12. State whether or not friends of Mr. Anthony came from elsewhere to relieve you; and, if so, state who they were.

Ans. They did. The first was Mr. George W. Dean, who came from Louisville in answer to a dispatch from me. Mr. J. L. Peirce

came from Providence. Mr. Wagner also came from Vernon, Indiana.

Int. 13. State whether or not you obtained a surgeon for Mr. Anthony. If yea, who was it?

Ans. To the best of my recollection I gave an order at the office of the hotel, and Dr. Powers was summoned through the office.

And being cross-examined saith:

X Int. 14. Was there a telegraph station at the place of accident?

Ans. Not to my knowledge.

X Int. 15. Were there any section men working near the place of the accident at the time?

Ans. I do not know.

X Int. 16. Were the air brakes and air appliances on the cars that remained on the track injured by the accident?

Ans. I didn't observe any upon the cars.

X Int. 17. Then if they were on the cars you don't know whether they were injured or not, do you?

Ans. No, sir.

X Int. 18. Who of the company's employees did you see at the time or just after the accident?

Ans. None at the time. Just after I saw the conductor and the baggage master. That is all that I distinctly remember.

X Int. 19. Was not a brakeman injured during the accident?

Ans. I think there was.

X Int. 20. Do you recollect the name of the agent you telegraphed to in St. Louis?

Ans. I can't call it to my mind at this moment.

X Int. 21. How much whiskey did you give to Mr. Anthony after the accident and before you arrived with him at St. Louis?

29 Ans. I gave it him twice; a wineglassful or more at each time.

X Int. 22. Did you dilute it with water?

Ans. I did.

X Int. 23. Did he swallow it without considerable difficulty?

Ans. We held up his head; we told him to take it, and he took it and swallowed it.

X Int. 24. How much quinine did you give him?

Ans. I should think about twelve grains.

X Int. 25. You stated in your examination-in-chief that the quinine was in pills. What was the size of the pills—how many grains?

Ans. Two grains.

X Int. 26. Did you use water in administering the quinine to enable the patient to swallow the pills?

Ans. We did.

X Int. 27. Did you examine carefully the head and wounds on the head of Mr. Anthony, and was there or not, so far as you could discover, any fracture of the bones of the skull?

Ans. I saw the wounds very plainly, but was incompetent to decide whether there was any injury to the skull or not.

X Int. 28. Did you not state awhile ago, in answer to a question of the plaintiff's attorney, that you thought at the time that the skull was fractured?

Ans. Yes, sir.

X Int. 29. State, please, how many people were wounded and hurt by this accident.

Ans. I never knew.

X Int. 30. Do you think there was as many as ten?

Ans. I never had any way of knowing.

X Int. 31. How many physicians came out from St. Louis to attend the wounded?

Ans. None that I knew of.

X Int. 32. Didn't you state in your examination-in-chief that you found occasion to complain that time was taken by the physicians in dressing small wounds after the arrival of the engine from East St. Louis or St. Louis?

Ans. Yes.

30 X Int. 33. Can you not, then, state about how many wounds of this character were dressed, causing the delay you complained of?

Ans. No, sir.

GUSTAV RADEKE, a witness of lawful age, being produced, sworn, and examined on the part of the plaintiff, deposeth and saith:

Int. 1. What is your name, age, residence, and profession?

Ans. Gustav Radeke; age, 43; residence, Providence, R. I.; profession, physician and surgeon.

Int. 2. Where did you study your profession and for how many years have you practiced it?

—. I studied in Germany, principally at Berlin, and have practiced my profession about sixteen years.

Int. 3. Are you acquainted with Mr. Anthony, the plaintiff; and, if yea, for how long?

Ans. I am acquainted with Mr. Anthony, and have known him for several years.

Int. 4. In the month of November, 1883, were you called upon at any time to visit professionally Mr. Anthony? If so, state what his condition was, both from your own observation and from what he told you had happened to him.

Ans. I was called to see professionally Mr. Anthony November 4, 1883. I found him with a number of healing wounds on the head, very nervous, somewhat exhausted. I was told that he had met with a railroad accident, the date of which I did not put down and which I do not remember. Mr. Anthony stated that he was rendered unconscious for some hours after that accident; that he saw himself, as he supposed, in a mirror or looking-glass flying or spinning through the air; that he was picked up several rods from the

31 overturned car, recovering consciousness for a moment, finding himself bleeding and being attended to by those around him; that there was almost an entire blank of what happened after-

wards in his mind until he had been, as he supposed, some time at the hotel; that he changed his medical surgical attendant; that he was attended last, I think, by two medical gentlemen. Mr. Anthony complained much of exhaustion, but only of slight headaches. His general conditon was anemic; the tongue much furred; digestion disturbed; hardly any appetite; no fever.

(Objection to everything stated by witness as being said by Mr. Anthony.)

Int. 5. How long were you in attendance upon Mr. Anthony as the result of this accident?

Ans. Until December 24, 1883.

Int. 6. State generally what his condition was during the time that you treated him.

Ans. There were several wounds on the head in process of healing, one wound starting on the frontal bone about two inches and three-quarters above the inner corner of the left eyebrow, running upwards, turning an obtuse angle downwards towards the right temporal parietal bone, altogether about nine inches long. It was crossed at its lower point at the temporal bone by a five-inch long cut coming down towards the ear from about the junction of the right parietal and occipital bone. The nine-inch cut had at the obtuse angle and on another place at the frontal bone, the two places about an inch apart, the wound open to the bone; also was the bone bare, or to be easily reached by the probe, at two separate places in the five-inch cut. One of these places was near the occipital end, the other about the middle of that cut. There were several other abrasions, small cuts, and bruises on the right ear and right temporal region; also over the left eye and on the left part of the nose. The wounds healed slowly; the places where the
32 bone was exposed healed last. The places where the bone could be reached easily in the middle of the five-inch cut healed the very last.

His general condition was one of great nervous prostration; very easily irritated and exhausted by conversation and mental exertion, such as company, reading, and writing entailed. His sleep was fair; his appetite slowly recovered; with the returning appetite his physical strength improved.

On the 8th of November he complained particularly about great weakness in the back and legs. At that time his walking power was very much reduced.

On November 19th I did ask Mr. Anthony about his habit of halting in speech, a fact I had observed previously—that is, since my attending him—that he frequently hesitated to find the right word. My question was brought about by Mr. Anthony not being able to find the word "brush," as I had got some lint over me and had asked for the clothes brush. I did ask him in his wife's presence. He said that before the accident he never had to try to remember a word he wanted to use in conversation, which statement his wife then, and his daughter subsequently, confirmed.

On the 23rd of November Mr. Anthony tried to ride in the horse

car a short distance; he was by the ride completely shaken up nervously; had pains in the back of the head and in the back, and was very much nervously prostrated. The back-ache lasting, I made, on the 27th of November, an especial examination of his back and found the ninth and tenth dorsal vertebra very sensitive at my pressure, the sensitiveness extending along those ribs connecting with the bones mentioned.

On December 2nd Mr. Anthony complained much about great weakness and numbness in the left arm particularly, a similar feeling in less degree affecting the whole left side.

33 When I saw Mr. Anthony last, December 24th, his general physical strength was improved. He was still very nervous and easily used up by nervous or mental effort.

(Objection to so much of preceding answer as refers to what Mr. Anthony, Mrs. Anthony, and Miss Anthony said to witness.)

Int. 6. I desire to ask your opinion as a medical expert upon the following question: In the generality of cases where men of the age of Mr. Anthony, of good physical and mental health, receive the injuries which Mr. Anthony received from this accident, undergo the experiences which he underwent, exhibit the symptoms which he exhibited, display the effects, both physical and mental, which he displayed as the result of his injuries, what, in your opinion, are the probable future effects of such injuries as tending to impair physical and mental health? In forming this opinion I desire you to take into consideration what came under your own observation in Mr. Anthony's case, all he communicated to you professionally with reference to his injuries, and the deposition of Mr. David M. Read in this case, which you have read this afternoon.

Ans. The probable future effect, physically considered, generally, and with especial bearing on Mr. Anthony's case, would be but a slight diminution in the purely physical functions and strength, though a state of being easier exhausted might be readily the consequence, especially as far as physical exercise is apt to affect the nervous and circulatory functions. A concussion of the brain by stunning interferes with the circulation of the blood in the brain, suspending by it the brain functions for a shorter or longer time,

causing brain disturbances which may pass off soon, but are

34 apt to last considerable time, more or less according to the seat of the brain disturbance, unfitting thereby the brain to perform its functions as well as formerly, as an egg is unfitted for breeding purposes by being shaken up, or as a magnet is deprived of its magnetic power, more or less, by the stroke of a hammer.

The mental powers are apt to be weakened either generally or in a special direction after brain injury. The memory may be impaired for words, or persons, or dates; it may be difficult to follow a train of thought; the whole nervous system is apt to suffer from hightened or increased nervous irritability, coupled with lack of nervous endurance.

Recovery under the circumstances in question is almost always incomplete; great tendency to nervous exhaustion and prostration

and a more or less permanent irritable state of the brain are very apt to follow such injuries at the best. Not unfrequently a sudden death after a few years has been observed.

And being cross-examined saith:

X Int. 7. Where were you born?

Ans. At Hamburg, Germany.

X. Int. 8. What year did you come to America?

Ans. 1870, end of March.

X Int. 9. At what university or college at Berlin did you study medicine?

Ans. There is but one university there—the University of Berlin.

X Int. 10. How long were you a student at this university.

Ans. Two years and a half. I also studied at Goettingen one year and at Munich one year.

X Int. 11. Did you practice medicine before you came to America?

Ans. I did not settle down to practice.

X Int. 12. What years were you at the University of Berlin, what at Munich, and what at Goettingen?

Ans. I was at Goettingen in 1863–'4; at Munich, 1864–'5, and at Berlin from 1865 to 1868.

X Int. 13. What was your first location in America?

Ans. Here in Providence.

X Int. 14. When were you first consulted professionally by Mr. John B. Anthony, the plaintiff?

Ans. November 4, 1883.

X Int. 15. Were you his family physician at that time?

Ans. His family physician being sick, I had been consulted previously by members of his family a few times.

X Int. 16. Who was his family physician?

Ans. I suppose Dr. Robert Millar, of this city.

X Int. 17. Was Dr. Millar sick on November 4th, when you were consulted by Mr. Anthony as to his injuries, as above stated by you?

Ans. I am under the impression that he was still sick; he was sick about that time; he was either sick or absent from the city.

X Int. 18. Have you ever been in consultation with Dr. Millar about Mr. Anthony's case?

Ans. No.

X Int. 19. Are you Mr. Anthony's family physician now?

Ans. No.

X Int. 20. When did you see Mr. Anthony last professionally?

Ans. The last time I saw him about this case was December 24, 1883. I may have seen him once or twice in the following January, but don't recollect.

X Int. 21. What is Mr. Anthony's occupation?

Ans. As far as I know, he was a director in a manufacturing establishment.

X Int. 22. Was it not a sewing-machine company?

A. I believe so.

X Int. 23. When you saw him last, on the 24th of December, was he well enough to go to his office?

Ans. To drive to his office and be there a short time.

36 X Int. 24. Do you know when he resumed his business fully?

Ans. No.

X Int. 25. What is his present physical condition?

Ans. I have no knowledge of it.

X Int. 26. Have you seen him recently?

Ans. Yes.

X Int. 27. Have you seen him to-day?

Ans. Yes; I see him now.

X Int. 28. Hasn't he appeared to be in good health?

Ans. He has appeared very nervous to me.

X Int. 29. What paper have you been reading from while giving your depositions?

Ans. A great part a copy of memoranda on my book, the rest notes to aid my memory in answering questions which I supposed I might be asked in relation to the case of Mr. Anthony.

X Int. 30. Do you make such memoranda on your books in all your cases?

Ans. Yes.

X Int. 31. During the time you were attending Mr. Anthony did you know that he intended to sue the railroad company for damages?

Ans. I did ask Mr. Anthony if he intended to do so, as in that case I would take more minute notes than usual. Mr. Anthony replied that he supposed there was no need of it, as he thought the railroad company would be inclined to make matters right without a suit.

X Int. 32. But you continued to take notes anyhow, did you?

Ans. My usual notes; yes.

X Int. 33. And you state that you have read from your notes or from a copy of them in giving your deposition this afternoon, do you?

Ans. From a copy of my notes, supplemented by what I remembered about the case.

X Int. 34. You say you have made no examination of Mr. Anthony since the 24th day of December, 1883. Would you not be able to testify more accurately as an expert if you had examined him carefully again in 1884, 1885, or 1886?

37 Ans. Undoubtedly.

X Int. 35. Is it not, then, true that your very interesting statement of consequences to him from the accident was based upon the knowledge you acquired of his condition during the short time you attended him immediately after the accident, and not from information or examination that you have since obtained or made?

Ans. It was based upon that and upon my knowledge and study as a physician in similar cases.

X Int. 36. You have lived, have you, in the same town with Mr. Anthony since December 24, 1883?

Ans. Yes, sir.

X Int. 37. Have you met him occasionally or frequently between that time and this?

Ans. Very occasionally only.

X Int. 38. Have you never been called on to prescribe for him since January, 1884?

A. No, sir.

X Int. 39. When you have met him was he going about attending to ordinary matters of business or pleasure?

Ans. With the exception of one time, when I met him for a moment at a friend's house, I passed him only in the street.

X Int. 40. Have you met him when he was either riding or walking—I mean to say have you not seen him riding and have you seen him walking during the period mentioned?

Ans. Yes, sir.

X Int. 41. Have you heard of his being sick from January, 1884, to March, 1886?

Ans. No, sir.

X Int. 42. What was your bill for services for attendance upon Mr. Anthony from November 4, 1883, to December 24, 1883?

Ans. About one hundred and twenty dollars.

(Counsel for defendant objects to so much of the witness' testimony as was read from the paper described by him and to witness reading from said notes.)

38 JAS. LEWIS PEIRCE, a witness of lawful age, being produced, sworn, and examined on the part of the plaintiff, deposeth and saith:

Int. 1. What is your name, age, residence, and occupation, and are you acquainted with Mr. Anthony, the plaintiff in this case; and, if so, how long have you known him?

Ans. Jas. Lewis Peirce; age, 55; residence, Providence, R. I.; occupation, merchant. I am acquainted with Mr. Anthony; have known him for thirty years or more.

Int. 2. In October, 1883, were you summoned to St. Louis for any purpose? If yea, for what purpose?

A. Yes, sir; I was. By reason of the injury to Mr. Anthony by an accident on a railroad. I was summoned there to care for him.

Int. 3. What did you do in response to that summons?

Ans. I proceeded to St. Louis with all possible despatch.

Int. 4. State whether or not when you arrived at St. Louis you saw Mr. Anthony; and, if yea, state particularly the condition in which you found him.

Ans. I did find him, on my arrival there, at the Southern Hotel. I was introduced by the clerk of the hotel to one of the doctors who was attending Mr. Anthony, whose name for the moment has escaped me, but who was a resident of the hotel, who cautioned me to keep Mr. Anthony from any undue excitement by reason of my coming. At the same time he said he thought that I had better go up and see him, as he was expecting me. I went to his room,

and the room, of course, being dimly lighted, I didn't realize how he looked until the next morning, when I saw him by daylight. I stayed with him at that time a very short time. I left him for the night to get rest for himself and sent dispatches to his family. The doctor wished me to make my stay that evening short, so that
39 he might not be excited by my being with him. I remember the doctor the next day told me to be careful not to give him any stimulants or anything that would tend to create a fever. I stayed with him from Thursday night until Sunday night, leaving him in the care of Mr. Wagner, whom he had summoned by telegraph from some other city. Mr. Wagner was in the employ of the Household Sewing Machine Company and well known by Mr. Anthony.

Mr. Anthony seemed to recuperate much faster than I had anticipated from what we had heard of his injuries, which was owing probably to large loss of blood and lack of inflammation.

I was present with the doctors the next morning when they dressed the wound, and then more fully realized the extent of his injuries from appearances, as he seemed to be pretty generally cut and bruised about the face and head and a general soreness and stiffness throughout the body. I remember of giving him myself a slight bath and rubbing down, and, although not accustomed to that business, that he expressed the opinion that I was born for a nurse.

Int. 5. You say that you stayed with him until Sunday night. When did you see Mr. Anthony again?

Ans. The next Saturday afternoon, at Waterford. I went from here on the train and met him at Waterford, Mass., half way from Worcester to Providence, as he was on his way home over the Providence and Worcester railroad.

Int. 6. Had any special provision been made for bringing Mr. Anthony from Worcester here; if so, what?

Ans. I arranged with the superintendent of the Providence and Worcester railroad for the use of a special car, which car was sent from Providence especially for this purpose.

Int. 7. Who did you find accompanying Mr. Anthony on his return journey?

Ans. His friend, Mr. Benjamin F. Thurston.

40 Int. 8. In what condition was Mr. Anthony then?

Ans. He was very weak, so much so that I remember that when we met in the cars he was affected to tears and could hardly speak to me. I spent most of the time in the car coming down in talking with Mr. Thurston about him.

Int. 9. How far did you accompany Mr. Anthony on his return?

Ans. From Waterford to Providence, about eighteen miles.

Int. 10. State whether or not you accompanied him to his home.

Ans. I had arranged for a carriage to meet us at the depot, and went with him to his home in it.

Int. 11. On his arrival at his house do you remember of any circumstance happening indicating the mental condition in which Mr. Anthony was then? If so, state it.

Ans. I remember that his wife and daughters met him in the hall and accompanied him into the library, in which room he was seated. He wore a soft felt hat, and I noticed, after having been in the room a few minutes, that he had not removed it from his head, and I jokingly remarked to him that here in New England we did not wear hats in the presence of ladies. He then removed the hat from his head, not seemingly having realized that he had it on.

And, being cross-examined, saith:

X Int. 12. Are you related in any way to Mr. Anthony or his family?

Ans. None whatever.

X Int. 13. What special interest did you have in him that caused you to go to St. Louis to attend him after the accident?

Ans. About the year 1850 Mr. Anthony and myself were clerks for David Lisson, then agent for the Fall River Iron Works, and boarded together in the city. The intimacy then established has continued and extended between the two families of Mr. An-
41 thony and myself, so that when this accident to him occurred it seemed to me, as it did to this community, knowing our relations, that I was the one to go and care for him.

X Int. 14. What position did Mr. Anthony afterwards occupy in that company?

Ans. None. He left that company to take the treasurership of the Providence Tool Company, this Providence Company having become the property of the members of the Fall River Iron Works, or largely so.

X Int. 15. What connection had he and what connection has he now with the Household Sewing Machine Company?

Ans. He was at the time of the accident the treasurer and general manager of the Household Sewing Machine Company.

X Int. 16. How long did he continue in this position and what position has he now with that company?

Ans. He retained those two offices up to the time of this accident, and by reason of this accident the company was obliged to elect another treasurer, he still retaining the office of general manager up to within the last month or two.

X Int. 17. How far is it from here to Waterford, where you met Mr. Anthony?

Ans. I should say about eighteen or twenty miles.

X Int. 18. About how far is it from St. Louis to Waterford by the route by which Mr. Anthony traveled home?

Ans. I don't know.

X Int. 19. What did it cost you for a special car from Worcester, fourty-four miles from Providence, to Providence for Mr. Anthony?

Ans. In asking the superintendent for this car the matter of compensation for it wasn't mentioned. I did not pay one dollar, and, so far as I know, no charge was made. Mr. Thurston, who accompanied Mr. Anthony, was a director in this Providence and Worcester railroad.

X Int. 20. Do you know whether or not Mr. Anthony is now con-

nected with any other corporations than those you have men-
42 tioned?

Ans. I do not.

X Int. 21. Did Mr. Thurston, the director you have mentioned, accompany you when you went to Waterford to meet Mr. Anthony?

Ans. Mr. Thurston was with Mr. Anthony, joining him at some point in the West and accompanying him through to Providence.

MARY B. ANTHONY, a witness of lawful age, being produced, sworn, and examined on the part of the plaintiff, deposeth and saith:

Int. 1. What is your name, age, and residence, and how are you related to the plaintiff in this case?

Ans. Mary B. Anthony; age, 22; residence, Providence, R. I.; I am his daughter.

Int. 2. Do you remember the occurrence of the railroad accident to your father in October, 1883?

Ans. Yes.

Int. 3. State whether or not you were at home at the time he was brought from the West just after the accident, and were you at home during all the time of his illness after his return?

Ans. Yes.

Int. 4. Describe in your own way the condition in which your father was at the time he was brought home after the accident.

Ans. He was considerably thinner and his face was blotched in spots from the settling of the blood, especially around one eye. His head was thoroughly bandaged and plastered. He wore a soft slouch hat. He appeared very weak and tired from the journey. He was greatly excited upon arriving home. In a short time after arriving home he went to bed. He first decided not to have the doctor come to attend to his wounds and change the plasters, but during the night he was restless and wakeful, and so mamma changed the plasters and washed and dressed his head.

43 Int. 5. Do you remember how long your father was confined to the house from the effects of the accident?

Ans. I think it was about two or three weeks that he didn't go out at all. He was more or less confined to the house for a number of weeks.

BENJAMIN F. THURSTON, a witness of lawful age, being produced, sworn, and examined on the part of the plaintiff, deposeth and saith:

Int. 1. What is your name, age, residence, and profession, and are you acquainted with the plaintiff in this case; and, if so, how long have you known him?

Ans. Benjamin F. Thurston; age, 56; residence, Providence, R. I.; profession, counsellor-at-law. I have been intimately acquainted with the plaintiff since 1850.

Int. 2. Do you remember the occurrence of a railroad accident to Mr. Anthony in October, 1883?

Ans. I was advised, I think, on October 23, 1883, by a telegram from St. Louis, bearing the signature of a person unknown to me, to the effect that Mr. John B. Anthony had been seriously injured in a railroad accident and was then at the Southern Hotel, in St. Louis. I telegraphed at once to the proprietors of the Southern Hotel for information as to the occurrence and as to Mr. Anthony's condition, and received general advices in reply, and during the day received in answer to my telegrams further information from the same source, so that by evening I had become satisfied that the injury would not prove immediately fatal, although the situation was reported as critical as to the outcome.

Int. 3. What did you do in consequence of the information
44 which you received?

Ans. I felt that it was necessary that some friend of Mr. Anthony should proceed to St. Louis at once. I was so situated with respect to my family that I could not leave that day, and I requested Mr. Jas. Leewis Peirce to start that evening, and to report immediately upon arrival the exact condition in which Mr. Anthony was in order that I might accompany Mrs. Anthony, if it should prove to be necessary, to St. Louis. I understood that Mr. Peirce started that evening as requested. Immediately upon his arrival a full telegram was received giving the condition of Mr. Anthony as obtained from the surgeons in charge of the case, and I felt that it was not necessary, in view of the careful attention that Mr. Anthony was receiving [for Mrs. Anthony to undertake the journey in her then condition of health, which had been aggravated by the news of her husband's injury].

(Part of answer in brackets objected to.)

I arranged by telegraph and by correspondence with Mr. Peirce to come out and bring Mr. Anthony home in case he should be in condition to be moved and in case Mr. Peirce could not remain until he was sufficiently convalescent.

Somewhere about the 31st of October I started for the West, and from advices frequently received ascertained that Mr. Anthony would be able to leave under the care of an attendant on the evening of the 1st of November. I arranged by telegraph to meet him at Cleveland. He arrived in the afternoon train and I proceeded with him to Providence.

Int. 4. How did you find Mr. Anthony's condition when you met him and during the residue of the journey?

Ans. I found Mr. Anthony very weak and exhausted. He was in an exceedingly nervous condition, able to converse with great difficulty, and disturbed greatly by the movement of the train, particu-
45 larly when the train was running at considerable speed or rounding curves. He occupied the state-room of the car, and his attendant and myself took care of him during the night. We reached Worcester between three and four o'clock in the afternoon of the next day. Upon arrival I was informed by the station agent of the Providence and Worcester road that the superintendent had sent up a special car. Mr. Anthony was transferred to it. We were

joined by Mr. Peirce on the road and reached Providence between five and six o'clock. I left Mr. Anthony at the station with some friends that had assembled, being obliged myself to take a train then departing to join my family in the country.

During the journey Mr. Anthony's extreme nervousness was very apparent. It was impossible for him to speak without breaking down completely into tears.

And being cross-examined saith:

X Int. 5. Are you the attorney for Mr. Anthony in this case?

Ans. I am not in any professional sense, although I am familiar from his statement with the facts of the case as he has communicated them, and he has consulted with me as a friend as fully as he would with his counsel.

X Int. 6. Who is his counsel at Providence in this case?

Ans. I having been informed within a few days that Mr. Anthony's counsel in St. Louis proposed to have some depositions taken here, and on being asked by Mr. Anthony who would be a proper person to attend to the same, I said that my half brother, Mr. John D. Thurston, who occupies an office adjoining my own, would be entirely competent to attend to the duty of examining the witnesses, and he has discharged that office.

X Int. 7. What day and hour did you leave Cleveland with Mr. Anthony, and what day and hour did you arrive at Providence?

46 Ans. I should not have remembered the day of the month except as I am informed by Mr. Anthony that he left St. Louis on the evening of the 1st day of November. Assuming this to be correct, I left Cleveland on the arrival of the train—that is, as I believe, the through train from St. Louis to Boston, and somewhere about three o'clock in the afternoon, according to my recollection. We reached Worcester in time to connect with the four-o'clock train for Providence and reached here not far from half past five p. m. on the 3rd of November.

(And this was all the testimony in chief offered by plaintiff.)

The defendant, to sustain the issues on *his* part, read in evidence depositions of —— Terhune, H. S. Smith, and testimony of Lee Howell as contained in the affidavit, setting it out as marked.

On, to wit, March 17, 1886, the following stipulation was filed, to wit:

Stipulation.

Circuit Court of the United States, Eastern District of Missouri.

JOHN B. ANTHONY *vs.* LOUISVILLE & NASHVILLE R. R. Co.

It is hereby stipulated and agreed that the depositions of H. S. Smith and R. H. Terhune, heretofore taken in the case of D. Stern *vs.* Louisville & Nashville R. R. Co., may be read in evidence by the

defendant with like effect as if they had been taken in this case, subject to the same objections as to incompetency or irrelevancy as might be made if used in the case in which taken, all objec-
47 tions as to want of caption, certificates, or signatures of witnesses being hereby waived.

St. Louis, March 17, '86.

NATHAN FRANK,
Att'y for Pl't'ff.
HENRY W. BOND,
Att'y for Defendant.

R. H. TERHUNE, called as a witness on the part of the defendant, being first duly sworn, was examined in chief and testified as follows:

1 Q. What was your occupation in the year 1875 or thereabouts, and where were you living?

A. My occupation was inspector of steel rails for the Joliet Iron & Steel Company, and I was living in this city.

2 Q. State whether or not you were a graduate of any school whose course required a knowledge of steel rails.

A. Yes; I graduated in 1870 at Columbia College School of Mines as a mining engineer and metallurgist.

3 Q. What State is that in?

A. New York State and New York city.

4 Q. Were you engaged as inspector of steel rails by the Joliet Iron & Steel Co. at that time and in other capacities?

A. Yes; I was engaged in 1875 in the capacity of rail inspector.

5 Q. Were you the only inspector during that year for the Joliet Iron and Steel Co.?

A. I had a subordinate on the night turn—on the night shift—but I would remark his work was subject to my inspection in the daytime.

6 Q. Did you inspect during the year 1875 any steel rails made by the Joliet Steel Co. for the old St. Louis and Southeastern Railroad Co.?

A. Yes, sir; I did.

48 7 Q. Please state the process of your inspection at that time.

A. Among my duties was weighing the rails to see if they were of standard weight; also to inspect them on the flanges, webs, and heads for mechanical, visible mechanical, defects, and also to see if the straightening and drilling were correct; also to see that the notches for the spikes were correctly and accurately punched; also to see that the second-class rails were punched and marked different from first-class rails; also to see that they were placed in entirely different places in the yard; also to see that they were not too hard for railroad purposes, railroad use, or brittle, too hard and brittle for railroad use, which was determined by or referred to the chemist, results of carbon by mechanical and chemical tests of small steel pieces from the same cast and by the steam-hammer test of a rail

butt from the same cast, and duly reporting these conditions to the office and rejecting rails from a first-class order which did not come up to the standard.

8 Q. Were the rails produced by the Joliet Iron & Steel Co. branded of the year of their manufacture? They were all branded, weren't they, of the year of their manufacture? For instance, a year 1875 rail "1875" was on it?

A. Yes; "1875" was on it.

9 Q. Were there any shipments during that year of steel rails from the Joliet Steel Company to the old St. Louis & Southeastern railroad that did not pass your inspection?

A. No, sir; either mine or my subordinate. My subordinate did it at night, you know, but I was chief inspector. I don't know how you would answer that technically. We aimed to keep it to the
49 same standard. I would remark that all mechanical tests were under my control. Of course at night I was not there, because I couldn't work all the time.

10 Q. In subjecting rails to a second inspection the day following the night on which your subordinate had inspected them, did you or not have an opportunity of knowing the rails' condition thoroughly?

A. Of the night shift?

11 Q. Yes, sir.

A. I had; of the quality of steel I had an opportunity. When they were piled in the car, a complete car, for shipment there was no—the only guide I had for second or the presence of the undiscovered second would be the painted end by which we distinguished them; but if he was to miss painting the end, except that the mechanical defect was exposed as they lay piled in the flat cars, I would have no means of detecting them.

12 Q. Where is that subordinate inspector?

A. He was in this city two years ago. He is out of the employment, I think, now.

13 Q. Have you been able from an examination of the books or otherwise to recall anything of the sale during the year 1875 of certain steel rails of the Joliet Steel Co. to the old St. Louis & Southeastern railroad?

A. Yes; I have.

14 Q. Was that a shipment which you personally inspected?

A. Yes; on the day shift; but I had entire charge of the chemical and mechanical test of the shipment.

15 Q. That was a day shipment?

A. No, sir; but that shipment I had entire charge of the chemical and mechanical tests. All the steel was subject to my inspection for mechanical and chemical tests. This man had nothing to do with that; he was simply a subordinate to look for mechanical defects, attending to the drilling, &c., but the inspection for mechanical and chemical tests were entirely upon me. It could not be done well in the night-time. The chemist was absent and it was
50 not a comfortable thing to work about the steam-hammer.

16 Q. The chemical and mechanical tests of these shipments

in 1875 from the Joliet Steel Company for the old St. Louis & Southeastern R. R. Co. was subjected or was under your supervision in the daytime?

A. Yes, sir; except for the quality of iron; that came under another department; but I did not have anything to do with that—making the iron from which this steel was made.

17 Q. Did you bring any memorandum of that shipment with you?

A. Yes, sir.

18 Q. Please exhibit with your deposition the memorandum of the shipments made by the Joliet Steel Co. to the St. Louis & Southeastern Railroad Co. in 1875?

A. (Memorandum produced by the witness, as follows:)

Rails Shipped St. L. & S. E. R'y in 1875.

	Pattern.	No. 1.	No. 2.	Total.	Material.
April	56	175	13	188	Charcoal, 40 to 50 %.
May	60	59	9	68	Bituminous, 50 to 60 %.
					B.
Oct.	52	250	------	250	Brands, Missouri.
					B. C.
Nov.	52	54	------	54	Grand Tower, Scotia.
					c. c.
Dec.	52	78	------	78	Pacific, Escanaba.
					c. coke.
	Tons	616	22	638	Munsay, Bay View.
					Bay Furnace.

19 Q. In this exhibit I discover 616 tons steel rails, which are under the column marked "No. 1." What was the grade, quality, and character of those rails?

A. It was good, having passed my mechanical and chemical tests.

20 Q. Those rails under that column were subjected to mechanical and chemical tests under your own control, weren't they?

A. Under my own control.

51 21 Q. Was it your custom at that time, after testing a steel rail and discovering that it withstood successfully such tests as you have described in this deposition, to class it as a first-class rail?

A. Yes, sir.

22 Q. Were these 616 rails first-class rails?

A. Tons of rails.

23 Q. Tons of rails?

A. Yes, sir.

24 Q. Was there any mark or figure on the end of these first-class rails?

A. No, sir; except that which indicated their length.

25 Q. What was that generally?

A. It ran from nought to 9, indicating their length from 20 to 29 feet. I would remark in that connection it was customary to mark the length under the standard length in the road by a figure on the end, and I think at that time we had introduced a designation in the furnace number—had stamped it on the rail. In that connection we marked the number of the cast on the rail.

26 Q. Any one of the rails shipped as above stated to the St. Louis & Southeastern Railroad Co., which did not have on either end any designation of figure or otherwise to indicate second quality, belonged to the number of first-class rails included in said shipment, didn't it?

A. Yes, sir

27 Q. If any one of those rails included in that shipment was exhibited to you entirely free on both ends from the figure "2" or from any white lead, what class would that rail belong to?

A. First class.

28 Q. Please state whether or not in the course of manufacture a steel rail may contain in itself a gas cell.

A. It may.

29 Q. Please describe in the course of manufacture how this gas cell may result, fully.

52 A. A true gas cell in the ingot is in the center of the ingot, and in all subsequent manipulations it retains the same relative position in the resulting part of it. It may be elongated and will act to prevent cohesion in the finished product—in the interior of the finished product.

30 Q. Could such a gas cell exist and become elongated in course of manufacture of a first-class steel rail without its being discovered by any of the tests which you have described in this deposition?

A. Yes; being a defect of the Bessemer process.

31 Q. Should such a flaw exist in the interior of a steel rail product would or would not such a rail have less strength and durability than one free from such flaw?

A. It would.

32 Q. Assuming that a rail had an exterior of solid and perfect steel and was unmarked by any notation indicating it was second class, and that it was included in the shipment made by the Joliet Steel Company to the St. Louis & Southeastern Railroad Company, was there any test in existence at that time by which a flaw resulting from a gas cell in the heart of such a rail could have been discovered before shipment?

A. None that were customary or none that were practicable.

Cross-examination:

1 C. Q. In 1875, Mr. Terhume, how long had you occupied the position of steel-rail inspector and examiner?

A. Since my connection with the mill, in 1873.

2 C. Q. Since you came to the mill?

A. Yes, sir.

3 C. Q. From 1873 to 1875 did you occupy the position of leading expert for that mill?

A. Rail-inspecting expert; yes, sir.

4 C. Q. Can you now recall positively the fact of the ship-
53 ment of steel rails by the Joliet Steel Works to the St. Louis and Southeastern Railroad Co. in 1875?

A. I cannot recall it positively; it was a small order, but positively I cannot.

5 C. Q. This memorandum you have exhibited is one that you took from the books of the company yesterday?

A. Yes, sir. I can remember the road as among our customers.

6 C. Q. You could only from your inspection of steel rails discover a visible mechanical defect, couldn't you?

A. Yes, sir.

7 C. Q. And in making investigation of this shipment you were only enabled to discover the patent, visible defects?

A. Yes. In that connection it would be hard to classify high carbon as a visible defect. What was patent by visible methods or chemistry; nothing by any other way. I only found visible mechanical defects. That cannot be a mechanical defect—high carbon.

8 C. Q. If you made a chemical test of this shipment during the process of manufacture you would have been able to have discovered defects that were inherent in the rail or in the process of manufacturing the rail, and which were not visible, would you?

A. No, sir; I would not.

9 C. Q. Why not?

A. Because the fusion of gases does not depend upon chemical composition; it is a coherent defect in the process.

10 C. Q. Do you remember, with respect to this particular shipment, of having reported to the office the conditions of any rails which indicated they were not strictly first-class?

A. No, sir.

12 C. Q. You don't remember?

A. I don't remember calling attention to conditions that were not first-class.

13 C. Q. Did you consider the order of the St. Louis and
54 Southeastern Railroad Co. for steel rails a first-class order?

A. Do I consider——

14 C. —. Did you at that time consider it?

A. The railroad order?

15 C. Q. Yes.

A. As a first-class order?

16 C. Q. Yes.

A. I don't remember the extent, but we did not make a second-class rail—that is, we didn't run on second-class rails.

17 C. Q. Did you find anything in the examination of the books of the Joliet Steel Company with respect to this shipmeut which indicated that the rails were not strictly first-class?

A. No, sir.

18 C. Q. Were the mechanical and chemical tests in 1875 the same as those in 1883?

A. Practically.

19 C. Q. The tests and manner of tests and proficiency of tests had not improved in those eight years? Am I to understand you as saying that?

A. Yes, sir.

20 C. Q. What was the length of the rails shipped to the St. Louis and Southeastern?

A. I don't remember.

21 C. Q. Do you remember whether they were under 30 feet?

A. No, sir; I don't remember.

22 C. Q. They might have been, but you would not remember?

A. I would not remember. I mean standard length. They were sawed the length which you people ordered them. It depends on the will of the railroad—the length of the rail.

23 C. Q. You don't remember the length?

A. No, sir.

24 C. Q. What was the standard length of steel rails in 1875?

A. They varied with railroads from 26 to 30 feet.

25 C. Q. What was regarded as the best length for wear, tear, and durability?

A. There was no data upon it. It was the caprice of the engineers.

55 26 C. Q. What is your own opinion as an expert as to the proper standard length of a steel rail used by the trunk lines in 1875?

A. The longer the rails the fewer the joints. I knew of no other advantage in a long rail except reducing the number of joints.

27 C. Q. In reducing the number of joints the road-bed and railing of the road became more compact?

A. It comes cheaper and compact.

28 C. Q. The fewer joints the less liability to accident?

A. Compactness would increase the safety—reducing the number of joints.

29 C. Q. In this shipment I find 22 tons of rails under the column "No. 2." What did that mean?

A. It meant the road took second-class rail to that extent during these months.

30 C. Q. I find under the column marked "Pattern" the numbers "56," "60," and "52." What does that mean?

A. That indicates the pounds of steel per yard of rail.

31 C. Q. What was the best standard, in your judgment as an expert, of steel rail of pounds to the yard in 1875?

A. The very heaviest that the company could pay for.

32 C. Q. That was how much?

A. The heaviest standard used then?

33 C. Q. Yes.

A. 65 pounds on the Grand Trunk railroad, 60 by the Rock Island and Alton. They are three trunk lines.

34 C. Q. Now, coming to the question of a gas rail, you said that a steel rail which had a gas cell had less durability. Do you mean to be understood as saying that a steel rail laid down upon a road containing a gas cell would break by the ordinary use of the company in running its passenger trains over that rail?

56 A. I say that the elongated gas cell would vitiate the rail.

35 C. Q. Would it break by the ordinary use of the company in running passenger trains over it?

A. I should say that would have to be determined experimentally.

36 C. Q. You don't wish to be understood as saying that a rail containing a gas cell would inevitably break as soon as a passenger train ran over it?

A. No, sir.

37 C. Q. And that also it might, with no other circumstance, combined with the running of the train—that it might stand the use of a good rail for a considerable length of time?

A. I say it would depend on the elongation of the gas cell. You are putting the limit where it would constitute distinctly a second-class rail, as far as durability and safety are concerned.

38 C. Q. When would that gas cell begin to elongate?

A. In the process, as soon as it entered the blooming train—as soon as the process of rolling was inaugurated.

39 C. Q. After the rail was complete and ready for sale would the process of elongation have stopped or would it still continue elongating?

A. It would stop, except under strains. I say that there is a point where the passage from the condition of an elongated cell to solid steel would begin, and it would remain a source of weakness until the solid steel was reached and an entire disappearance of the gas cell. It would remain a point of weakness.

40 C. Q. How would that gas cell disappear?

A. How would it disappear?

41 C. Q. Yes; until it disappeared.

A. It would disappear by the fact you can only elongate a point for a certain distance. You can get where there is nothing more to elongate.

42 C. Q. Supposing that in 1875 one of these rails which

57 you had shipped to this railroad had been placed upon their road-bed and it contained a gas cell, how long would that rail remain in use, assuming now that it was upon the main line of the road, without breaking the rail?

A. It could only be determined experimentally.

43 C. Q. If that rail laid there a year without breaking, according to your experience as an expert, would you say that the result of the breaking of that rail five years thereafter — by it containing an air cell or gas cell?

A. It would depend upon the conspicuousness of the opening—the conspicuousness of the expansion of this flaw. If it were conspicuous I would say it caused the breakage.

44 C. Q. What do you mean by conspicuous?

A. Very visible by having been flattened out and under strain.

45 C. Q. And that could be visible to the naked eye?
A. To the naked eye.

Redirect examination:

1 R. D. Q. Suppose a rail manufactured under the conditions and subjected to the test of a first-class rail, as described in this deposition, had contained an invisible interior flaw caused by a gas cell, and was broken in about a year after it was laid on the track, and had disclosed after its fracture an interior flaw, would you want to say that this flaw caused the breaking of the rail?

A. I should say that a flaw—a visible flaw—caused the breaking of the rail after it had been — a year.

2 R. D. Q. A first-class rail in every respect, according to the conditions you have described in this deposition, would ordinarily stand much longer usage and wear than one year, wouldn't it?

A. Yes, sir.

58 3 R. D. Q. Please state whether or not in 1875 the standard of weight for first-class rails was from——

Objected to as leading.

4 R. D. Q. Well, please state how many pounds per yard. What was the standard weight at that time?

A. There was no standard, but it was an accepted fact among engineers that the heavier the rails were the better, and that very light rails on very heavy roads were unprofitable and unsafe.

5 R. D. Q. Were or were not some of the safest roads at that time using rails varying from 45 to 60 pounds per yard in weight?

A. I don't remember of our mill having produced a 45-pound rail, but it is a fact that they are in use to-day on some roads leads me to think they were in use as low as 45 pounds.

6 R. D. Q. The number of pounds under the column "Pattern," in your memorandum here, varying from 52 to 60, were at that time strict first-class rails, weren't they?

Objected to as leading and incompetent.

A. They were very common sections; I would answer that. That is, the area; it is the same thing as the area.

7 R. D. Q. What do you mean by common sections?

A. I mean sections that were used. It means form. The word "section" would mean form as well as area. They were sections used by the leading railroads—by different railroads—at that time.

8 R. D. Q. Do you mean they were sections used by leading railroads in their orders for first-class rails?

A. Yes, sir; *condually;* and that it was endorsed by the leading trunk lines.

9 R. D. Q. State whether or not, in your opinion as an expert, sections of that weight were consistent with first-class rails?

A. Yes, sir; they were.

10 R. D. Q. You were asked in cross-examination *on* some-
59 thing about the standard length in steel rails. Please state whether or not your answer to that was merely your opinion on the subject?

A. In regard to the value of various lengths?

11 R. D. Q. Yes; about which was best?

A. It was my opinion of it—personal opinion—that these lengths—30-foot rail—has been settled upon by railroad engineers as the happy medium for length; that shorter rails were used by trunk lines, and a reasonable percentage of short rails were always a condition of sale. By short rails I mean they were from standard length down to 22 or 20 feet.

12 R. D. Q. Isn't it also true that railroads necessarily employ rails of that length required in the laying of their track—for instance, as upon an approach to a switch, isn't it frequently absolutely necessary to employ a rail of a length required to fill the opening?

A. Yes; without vitiating the quality of the road-bed, but necessitating probably more repairs for maintenance by short lengths by increasing the number of joints.

13 R. D. Q. While this must necessarily be done it need not vitiate the quality of the road-bed or the strength of the track?

Objected to as leading and incompetent.

A. No, sir; the use of short rails is inevitable in laying a permanent way at times; that while visible in connection with flaws to to the naked eye I contend that a fissure may vitiate a rail without being visible to the naked eye.

14 R. D. Q. Do you mean by this an interior fissure?

A. Interior fissure.

15 R. D. Q. Might vitiate a rail without being visible to the naked eye?

A. Yes, sir.

16 R. D. Q. Even after fracture?

60 A. Even after fracture. The word "visible" there might be construed into a microscopic visible; but we must accept the fact that there are inherent defects in the Bessemer process which lays the foundation for the production of gas cells, and their elongation in the finishing product is unavoidable.

Recross-examination:

1 R. C. Q. A fissure, you say, may exist in the interior of the rail and, therefore, not be visible to the naked eye?

A. The line of fissure would be visible to the naked eye.

2 R. C. Q. The line of fissure?

A. Yes; that is the point you want to clear up.

3 R. C. R. Then that rail having the line of fissure visible to the naked eye would be an imperfect rail?

A. Yes, sir.

4 R. C. Q. And ought to be removed?

A. After the fracture.

5 R. C. Q. How long after the rail was laid containing this inherent defect would this line of fissure be visible?

A. It could only be determined experimentally.

6 R. C. Q. This interior defect could never be discovered until after the fracture?

A. Until after the fracture.

Questions by Att'y for Defendants.

H. S. SMITH, a witness for the defendant, being duly sworn, deposed, to wit:

Q. 1. State your name, age, residence, and present and past business.

A. My name is H. S. Smith; my present business is that of general superintendent of the Joliet Steel Company; residence, Joliet, Illinois. I have been the general superintendent of said steel Co. since 1874.

Q. 2. What business is said steel Co. engaged in?

61 A. At the present time in the manufacture of steel rails only. Formerly it was engaged in the manufacture of iron, steel, and many kinds of iron and steel products.

Q. 3. Do you know what tests steel rails are or have been subjected to in the course of manufacture by said steel Co.?

A. Yes, sir.

Q. 4. Please state fully and in detail what these tests are and how they have been applied by said steel Co.

A. Well, first we buy known brands of pig-iron or known furnace products; from these we make the chemical analysis. The different brands of iron are mixed in a cupola; then this iron is converted into steel and cast into steel ingots; from this cast a test piece is taken and submitted to the first mechanical test, which is drawn into a three-quarter-inch square bar and bent cold at right angles. If it stands this bend it is known to be of sufficiently mild steel, which will not fracture or break under the service which it has to perform. (I here exhibit the brands of pig-iron — which the above-described steel was manufactured in 1875, identifying the exhibit under my hand and name.) The ingots at the stage above described are converted into rails; from each separate cast or heat a section of rail is taken for the second mechanical test, which is to place it upon a bearing 14 inches apart; then the drop falls upon the rails so placed with sufficient force to deflect this bar or rail section to about a sixty-degree angle. If it stands this test without fracture it will stand any service it has to perform. That terminates the mechanical tests. Then after the rails are manufactured they all pass under the inspection of an expert, and if he detects any imperfect rails by observing any flaws which can be seen as defects these defective rails would be thrown out and classed as sec-

62 ond quality & so shipped. The chemical tests or analysis is conducted and was conducted in 1875 in this way. We buy certain brands of iron from certain furnaces, branding their pro-

ducts as appears on the exhibit to this deposition. We analyze these various brands chemically from time to time to see that they conform to the requirements suitable for the manufacture of Bessemer steel, and we only use such as come up to the requirements.

Q. 5. State whether or not the Joliet Steel Company sold the quantity of steel rails shown on the exhibit here to the St. L. & S. E. R. R. Co. in the year 1875.

A. That exhibit shows the date and amount, &c., of our (the Joliet Steel Co.'s) sales to that railroad company at that time.

Q. 6. What was the grade in character of the iron used in the manufacture of the steel rails so sold to the St. L. & S. E. R. R. Co. and what was the character of the steel rails thus manufactured and sold?

A. The best commercial quality both of iron and manufactured rails.

Q. 7. At the time of this sale and manufacture were the tests which you have described applied?

A. Yes, sir.

Q. 8. What were the usual and approved and best tests then known or used by manufacturers of steel rails?

A. The very ones that I have described in this deposition.

Q. 9. What was the business & general commercial standing of the Joliet Steel Co. in 1875?

A. The reputation of the Joliet Steel Co. for the manufacture of steel rails was first class at that time and since.

Objected to as incompetent.

Q. 10. Did you know its general reputation at that time?

A. Yes, sir.

Same objection.

Cross-examination by plaintiff's att'y:

63 Q. 1. How much of the 2nd quality of steel rails were contained in this shipment?

A. I don't know that there was any.

Q. 2. Please look at the exhibit and see whether there was (22 tons) of second quality steel rails shipped in that shipment.

A. I find it to be so.

Q. 3. The second quality of rails are such rails as the expert in his examination rejects?

A. The second quality is such as I have formerly described as are thrown out by the expert as having mechanical defects.

Q. 4. What weight of steel rails are now in use by R. R. Co's such as the L. & N. R. R. Co.?

A. We manufacture rails from 35 to 70 lbs. per yard; the different railroads use different weights of rail.

Q. 5. How long will a rail of 52 lbs. to the yard in constant use by heavy railway traffic stand wear?

A. I don't know. It depends on the traffic, the way it is laid, the care it has in keeping it in true line and surface, and other causes.

Q. 6. Will a rail weighing 52 lbs., 56 or 60 lbs. stand the service which a rail weighing 70 lbs. will?

A. No, sir.

Q. 7. Did you ever hear or know of a rail—a steel rail—manufactured by your company and sold as first quality breaking on account of its own defectiveness aside from other causes?

A. No, sir.

Re-examination by Mr. BOND:

Q. 1. You were asked in cross-examination whether or not there was a small portion of the shipment made by the Joliet Steel Company to the St. L. & S. E. R. R. Co., as per your exhibit to this deposition, consisting of 2nd quality of steel rail. Please explain how that happened fully, and what use such second quality of rails is put to by such purchasing railroad, and how they were stamped at time of shipment.

64 A. In most of our orders with R. R's for steel rails a certain per cent. of 2nd quality of steel rails is allowable—what is termed 2nd quality of rails. These second quality of rails is where the expert finds there is some mechanical defect, like a flaw in the flange or a defect which is readily seen by the eye. These rails are marked on the end with a figure "2," which are also shipped and billed as No. 2 rails. Railroad Co's usually lay these rails near the stations or side tracks, but I have known them as buying them as 2nd quality of rails and putting them in the main line and having no trouble with them. The second-class rails were all designated by figure 2 stamped on each end of the rail. If you do not find the figure 2 on both ends of a rail, then it was shipped as a first-class rail. The figure 6 when stamped on a rail shows only the number of the furnace in which the rail was heated. All rails bear the number of the furnace in which they were heated.

Q. 2. What weight of steel rails were in use in 1875?

A. The general weight was from 45 to 60 lbs. per yard.

Q. 3. Were rails of this weight considered by manufacturers and railroad Co's at that time, 1875, as possessing every element of strength and safety for general use?

A. I don't know of any Western road at that time using anything heavier than 60-lb. rail.

Q. 4. Please state whether or not a steel rail manufactured out of the best material and having been subjected to the best and most approved tests in course of manufacture and afterwards might not have an internal and hidden seam produced by a bubble of gas or air having become imprisoned in the melted steel which

65 would cause its fracture without any possibility of the detection of such hidden effect by the manufacturer or the railroad company.

A. In the casting or pouring of liquid steel into a mold there is sometimes a gas generated which is imprisoned or contained in the ingot. This leaves a cell or open space which, in its manipulation from the ingot to the rail, will elongate this gas cell into the line

or lengthwise of the rail and will not come to the surface. This, in mill parlance, is called pipe steel, and cannot be discovered by the eye or mechanical tests without cutting the bar in two at that point, and then at times it may be so closely united that it would not be detected by the eye, but after being exposed for a time after cutting it in two it would oxidize and then be observed by the line of oxide. This defect cannot be discovered by any chemical test.

Q. 5. Might or might not such a defect cause a rail to break which would not break which was wholly homogeneous or free from such defect?

A. A rail containing such a defect would not have the same strength as a solid bar.

Deposition of Lee Howell, which was filed for purpose of obtaining a continuance of the cause, was read, it being admitted that if personally present he would testify as stated in his affidavit, to wit:

"That immediately after the accident on account of which this suit is brought, to wit, Oct. 23, 1883, said witness, who was then superintendent of said division, went to the place of the accident; that he thoroughly examined into the causes and circumstances thereof, and ascertained that the road-bed, spikes, and cross-
66 ties were in perfect condition; that the only cause of the derailment of the coach whereby plaintiff was injured was on account of a broken rail; that this rail was of steel of the best make and temper as far as could be discovered by any external inspection or examination whatever.

That its fracture was caused only by reason of a concealed and hidden flaw caused by a gas cell or air bubble formed in the interior of said rail during its manufacture, and which could not have been discovered by any tests that might have been applied during its manufacture or afterwards.

That the entire surface of said rail was covered by a surrounding of perfect steel, affording no indication whatever of the interior and hidden defect therein, which was only discoverable after its fracture.

Said witness further testified that said rail was fully up to the standard as to size and weight required by R. R. companies for the first quality of rails, and was apparently in every way a perfect rail at the time said passenger train entered upon it."

CHARLES O. PARKER, being duly sworn on behalf of defendant, testified as follows:

Direct examination by Mr. HAMMIL:

Q. Your name is C. O. Parker?

A. Yes, sir.

Q. What is your age?

A. 35.

Q. What position do you occupy on the Louisville & Nashville railroad?

A. Superintendent of the St. Louis Division.

Q. How long have you occupied that position?
A. Since December 1st, 1883.
Q. How long have you been in the railroad business?
A. Since February, 1879, continuously, but off and on all my life.

67 Q. On what roads besides the Louisville & Nashville road?
A. The Louisville, Cincinnati & Lexington and on a branch; on the Chesapeake & Ohio and Louisville & Nashville.
Q. Are you acquainted with the track where this accident occurred?
A. Yes, sir.
Q. State to the jury the condition of that track prior to the time of the accident and at the time, so far as you are able to trace it up to that time.
A. I haven't been on foot over the track, but I am in the habit of riding on the rear end of a train and inspecting the tracks while going over the division, and if any of the tracks are out of surface or out of line I can tell and call the attention of the roadmaster to it.
Q. Just describe the track. Have you made a plat of it?
A. No, sir.
Q. I wish you would make a plat.

(Plat made by witness.)

The COURT: About what grade is that, do you know?
A. It was a straight track where the rail broke.
The COURT: Was that on a curve where the rail broke?
A. No; it is a straight track.
The COURT: Did you have any curve?
A. No, sir; there was no curve there, but there was a curve beyond.
The COURT: The point I want to understand is—of course every man knows the difference between a train passing along a straight track and a curve.

Q. This train was running east, this way?
A. Running westward towards St. Louis from the east.
The COURT: Well, the curve was how far beyond the point where the accident occurred?
A. About 300 feet west of where the rail broke.
Q. Before you struck that it was straight?

68 A. We were on a straight line when the rail broke, and the train ran about 300 feet before it struck the curve, and the momentum of the cars carried it that distance.
The COURT: When you got off the track you struck the curve?
A. We were running on a straight track, and had been some distance before the broken rail was reached, and when the train ran off we were on a straight track.
Q. How far was it a straight track to the curve?
A. I don't know the length of the tangent; perhaps a mile—that is, east of the wood. There is no curve where the rail was broken, and the reason these cars went over on the bank was because when

they struck the curve they ran straight, instead of taking the curve, and went down the bank.

The COURT: I wanted to know where you were.

A. We were running on a tangent for some time previous to the accident.

Q. You mean on a straight line?

A. Yes, sir.

(Plat shown to the witness and explained to the jury.)

Q. Now, Mr. Parker, state to the jury as nearly as you can, prior to the accident, in what condition that track all along there was, as near the time as you can; state when you were there over it.

A. This accident occurred at the time of the year when the track would generally be in its best condition, because in the summer time you work and get the track in good shape, and it is one of the best tracks—as good as any we had. It was a track the men all knew and all relied upon to run fast if they were behind time. That was a track they could make up their time on, because it was smooth and slightly down grade from there on to St. Louis.

The COURT: How far is this from St. Louis?

A. About three miles and a half.

69 The COURT: It was the other side of the bluffs?

A. Yes, sir.

Q. You were on the bottom—the low land?

A. Yes, sir.

The COURT: You ran on a level for awhile?

A. Yes, sir.

The COURT: The point I want the jury to understand is whether you were running on a tangent or a straight line?

A. We were running on a tangent; a tangent is a straight track.

Q. I will ask you to state to the jury if at the time this rail broke—suppose it to have broken at any time when any portion of the train was upon it—suppose it didn't break until the rear coaches reached it—was the engine of the train at that time still upon the straight track?

A. Well, the train was 300 feet long; the engine would be about at the point of the curve when the last car would be at the broken rail.

Q. So, as I understand you, the train being about 300 feet long, it was then about 300 feet from the broken rail to the curve?

A. Yes, sir.

Q. So that all the train could have been between the broken rail and the curve?

A. Except the engine.

Q. Now state to the jury what I asked you before, Mr. Parker, about the condition of that track as near to the time of the accident as you can fix it, as you know it of your own knowledge.

A. I stated to the jury that we considered that one of our best tracks—good surface, good line track; that we always considered a good track for us to make up time on.

Q. What kind of ballast on it?

A. Cinder ballast, well dried.

Q. State the condition of the ties as to soundness.

A. They were good oak ties; there was over 300 ties to the mile; that is considered very thick, and over the average generally put on tracks.

Q. State how you know that these ties were good. Have you made any examination of the place? Did you make any ex-

70 amination of the place after the accident?

A. I examined the place a few days after the accident; I don't remember that I had been over before; I was busy with other matters.

Q. A few days after the accident you examined them?

A. Yes, sir.

Q. State in what condition you found the ties at that time.

A. The ties were all sound in the track that were there at the time of the accident, except one, which was split by the flange of the wheel or the rail at the time of the accident.

Q. That was split by the flange of the wheel?

A. Yes, sir.

Q. State if you examined that rail and what condition it was in when you examined it, and how soon after the accident.

A. It was on the same occasion I spoke of, some two or three days after the accident. The pieces of rail were preserved. I examined them; it was broken into 5 or 6 pieces. The plate showed pieces of rail had been pulled out bodily out of the rail, forcibly—semicircle pieces had been pulled out. They were spiked down by spikes that had a hook on them. It was spiked down so firmly that it pulled out semicircle pieces.

Q. Out of the web of the rail?

A. Yes, sir.

Q. State to the jury what that indicated.

A. It indicated that the ties were sound and the spikes strong and driven in properly. Where the track is rotten, the spikes are imperfect, and the ties are too few the ties would be pulled up, but in this case the rail was kept in its place until it was hammered off piece by piece, just as the wheels had struck it in the front end of the rail, and broke off, and then when the next wheel came along it would break another piece off, and it indicated to my mind that it was very firmly spiked down. You could see the mark on the end of the rail where the wheels had struck it, hammered it, and flattened it.

71 Q. State to the jury more fully where the rail broke. Was it broke in many pieces?

A. After the initial break was made small pieces were broken out. The wheels coming along would strike the end of the rail, and strike it with tremendous force, and break a piece off. That showed that the rail was held firmly by the spikes and with the ties. Then the next wheel would come along, striking it so heavily or hammering it it would break off another piece and make a still larger opening. Then the next wheel would strike with greater force, and you could see on examining the rail where these ham-

mered places had been struck and flattened the end of the rail, but it was held down so tight by the ties, and that was the reason it broke off in these pieces. Had it not been well tied it would have come out bodily.

Q. State to the jury if you examined that rail closely and critically; and, if so, what was the result of that examination?

A. Yes, sir; I naturally examined it closely to see if I could detect the cause of the breakage, and I found that it had a longitudinal seam in the head of the rail, the upper part beyond the head of the rail, which indicated that in rolling it had not been solidly made. This seam was running through the rail in that way, giving the rail a tendency to split, although it might last there a long time; but it was finally split, and where one piece of the rail had been broken squarely off I could see this same small break running back—a place so small that you could about put a hair in. You could see that at the end of the rail.

Q. State particularly what portion of the rail that was in.

A. That was in the head of the rail or the ball of the rail and at the east end, where the fracture commenced.

Q. State to the jury whether any outward inspection or examination could have detected that seam which you speak of.

72 A. Judging from its appearance when I saw it, it could not. The piece I saw didn't go up to the top. It extended near the top and formed a kind of a tube in the rail. I have since seen other rails in the yard that were broken that would show the same kind of fracture. It looks like as though there had been a bubble of air inside during the casting.

Q. What kind of a rail was this?

A. Steel rail made at Joliet, Illinois.

Q. What was its weight?

A. It was 4 inches high and weighed about 52 pounds to the yard.

Q. State to the jury whether that weight and quality of rail is considered a safe rail.

A. I think so; yes, sir; there are a good many rails in our track only 45 pounds to the yard and they are considered good.

The COURT: What is your gauge?

A. Our gauge is the regular standard. It is called the standard gauge.

Q. State to the jury whether that rail was of sufficient weight and of good enough quality for the traffic and business that was used on that road and always had been on the road since you were connected with it.

A. Yes, sir; I so considered it. This rail was stronger than a 60-pound rail with a less number of ties to the mile.

Q. You can state to the jury what traffic was usually run over that road and the character, as to passengers, freight, etc.

A. We had at that time twelve trains passing over that track every day—six passenger trains and six freight trains.

Q. Well, state as to the character of freight trains—how heavy they were usually, and what kind of traffic it was.

A. Well, it was not considered heavy traffic. I think the average was about six cars to each train, pretty well loaded in one direction and mostly empty in the other. It is light traffic that you find on many of the roads. Our road was a little below the aver-
73 age of the roads run out of St. Louis.

Q. State more fully, if you please, in regard to the character of the rail, as to its weight and whether it is in general use.

A. I think at that time, when the rail was laid, it was supposed to be about a rail of 50 or 52 pounds, and was the general standard. Now I think it is 56 pounds that is considered the standard that we have on the road since the Louisville & Nashville got the road. Some roads have 58 pounds and some still heavier.

Q. State, if you know, how long these rails were on the track, Mr. Parker, in this particular part of the track.

A. I don't know positively. I suppose from 1879 because these rails were branded 1875.

Q. Do you know where it came from when it was put in the track?

A. No, sir; it was what is called a closure around the switch.

Q. Explain what you mean by that to the jury.

A. A great many railroads lay their tracks with what they call broken joint. This was laid with a broken joint, and when switches are put in it is necessary, to do that, to throw the joints opposite, so as to get the middle of the opposite rail opposite to the weak point in the joint and strengthen the track.

Q. State to the jury if this was shorter than the usual lengths were.

A. I have just explained that it was necessary to put the end of the rail in such a place. This rail, I think it was 15 feet long. I think the ordinary length of the rail is 30 feet, but we have to use a shorter rail when we put in switches.

Q. Was it the rail next to the switch? Was this rail that you say filled this place or closure, was it next to the switch?

A. It was either the next one to the switch rail or the second or third rail, I have forgotten which now. I made careful notes about the thing, but I have not had a chance to look at them.

74 Q. Well, state, Mr. Parker, now, to the best of your recollection, how soon before the accident you were on that part of the line.

A. I would not be able to say. I generally came over the road at least once a week; sometimes I have been kept in my office so that I didn't see it for a week, but I don't think it was more than 10 days before the accident that I have been over that line.

Q. State to the jury the condition you found the track in at that time.

A. The track was good and smooth. I think I explained the condition of the track some time ago pretty fully.

Q. State with regard to the embankment near the track and about the grade.

A. There is a very slight embankment—just enough to give a little drain.

Q. Any more?

A. No, sir.

Q. And you state that when the rear end of the coaches, the last two coaches, struck this rail or the place where this broken rail was, that the engine would not have then reached this curve that you speak of in the track?

A. No, sir; not quite.

Q. State, if you know, Mr. Parker, how many men were engaged at that time on that section to keep up that part of the line.

A. No, sir; I don't remember now; at that time of the year we didn't have the amount of men that we would have had at another time of the year; they were scattered. I think we had about eight or ten men on a section.

Q. State whether that was a sufficient number of men to keep the track in good condition for the traffic that went over it.

A. Well, the tracks were in better condition at that time of the year than at any other time; there was nothing unsafe about it, but it was in the best possible condition, because in the summer
75 time it is all put in shape for the winter traffic.

Q. Do you know, according to the time-table of the road at that time, what trains had passed over this part of the track immediately in front of the passenger train—this passenger train—if you know?

A. Yes, sir; a freight train had gone ahead of the passenger train No. 18.

Q. State, if you know, of that train having any difficulty at this point.

A. No, sir; they had no trouble there.

Q. Passed over safely?

A. Yes, sir.

Q. State, Mr. Parker, from your knowledge as an expert on railroads in regard, to the railroad tracks where steel rails of the best manufacture are used, do they sometimes break without any apparent reason, without any flaw or any defect being apparent in the rail prior to the time it breaks.

Counsel for plaintiff objected to the question; objection overruled.

A. It is a fact that they do break. I don't know that they break without cause. I suppose there is a cause. We have a good many brands of steel on the Louisville & Nashville road. I have had experience on several divisions, and all our brands of steel are considered the best, but they are liable to be broken. We have to replace them very frequently, and we cannot tell the cause for the breakage, but I suppose there really is a cause, but it cannot always be accounted for. The great trouble about steel rails is that they are much more enduring but more brittle and apt to break.

Q. They are more brittle than iron?

A. Yes, sir; if you wish to express it that way.

The COURT: In other words, steel rails have a greater endurance, but are more apt to break when struck by a lateral blow?

76 A. Yes, sir; or a vertical blow. I suppose it would break quicker by a lateral blow than iron would, but I think it has greater endurance on a straight track.

The COURT: It will wear continuously, without any of these lateral or other blows, longer than iron rails?

A. It seems as though they will, but it seems that there is no way of testing a rail to find out the flaws.

The COURT: I suppose steel is more brittle than iron, but a lateral or vertical blow would be more likely to break it?

A. A blow would be more likely to break it.

Cross-examination by Col. DYER:

Q. When did the Louisville & Nashville railroad take charge of this road?

A. I don't believe I can give you the date; it was a little while before I came here.

Q. When did you come here?

A. In December, 1883.

Q. That was two months after this accident happened?

A. I was made superintendent in 1883. I came on the road the 1st of July, 1883.

Q. Where were your headquarters?

A. Evansville, Indiana.

Q. What division did you have charge of as assistant superintendent?

A. The St. Louis Division of the Evansville & St. Louis.

Q. How far is it from Evansville to St. Louis?

A. 163 miles.

Q. You went on the road the 1st of July, 1883, as assistant superintendent?

A. Yes, sir.

Q. Had you been on the road before that time?

A. Not on this division; no, sir.

Q. Did you know anything about the condition of this rail before July, 1883?

A. No, sir; not about its physical condition. I knew it was in the division of the Louisville & Nashville road.

77 Q. Didn't this used to be the St. Louis & Southeastern line?

A. Yes, sir.

Q. I will get you to state whether you recollect the old St. Louis & Southeastern railroad when it went into the hands of the receiver?

A. No, sir; but I know John Wilson was receiver of that road.

Q. For a number of years before that?

A. I think so.

Q. Don't you know it?

A. Yes, sir.

Q. Were you ever on the road during the time that this line was in control of the receiver?

A. No, sir.

Q. Do you know anything about the condition of the road during the time that it was being operated by John Wilson as receiver?

A. No, sir.

Q. Did you know the condition of the road at the time it was put in the hands of the receiver?

A. No, sir.

COUNSEL FOR DEFENDANT: I don't think that is competent.

Q. When was this track between St. Louis and Belleville put down, to your own knowledge?

A. It was not put down, to my own knowledge; I don't know.

Q. Do you know when, in point of fact, this particular rail of the road—when it was put down?

A. No, sir.

Q. Was it put down before you came upon the road or was it put down between the 1st of October and the time of this accident?

A. I think it was there when I came there. I don't know of any work being done on that portion.

Q. Do you know of any rails that were put in on that line of the railroad before this accident took place between East St. Louis and the bluffs?

A. We have laid a good deal of rail. I don't remember whether there was any laid at that time or not. There was a lot of new steel laid along there.

Q. How much new steel has been laid there since July, 1883? How much new track has been laid between these points since 1883?

78 A. There has been considerable steel laid there.

Q. How many miles?

A. I don't remember the number of miles.

Q. Why did you after 1883 take up the rails and put down new ones—what was the reason for that?

A. Because it was worn—some of them were worn; there was a heavy grade there.

Q. I am asking you how much new steel rail has been put down on that road since 1883 between here and the bluffs.

A. I don't think there has been any new steel put in between here and the bluffs.

Q. Would you have known it if there had been?

A. I would have known it at the time. I think the new steel was put down west of the bluffs.

Q. Did you ever inspect this track between here and the bluffs other than you have stated by riding on the end of the car passing over it?

A. I don't think I did.

Q. Did you ever go over the track on foot or on a hand car or on horseback to make an inspection of that track from the time you went on it up to the time the accident occurred?

A. No, sir; I think not.

Q. Were you ever off the train between here and Belleville and between here and these stations where the train stopped—between

the regular stations, except at the time you went to make this investigation?

A. I think I was.

Q. When?

A. I don't remember the dates; I think I have got off the pay car and examined them.

Q. When was that?

A. The car goes over the road every month.

Q. I will ask you when you did that?

A. I cannot tell you the date.

Q. Did you do it in 1883?

A. I think so.

Q. When was that switch put in?

A. It was there when I came there.

79 Q. What were the men doing at the time of this accident?

A. They were working on the side track.

Q. Do you know how long they had been to work?

A. I don't know; they reported they had been working some time before the accident.

Q. What were they doing?

A. I tell you I don't know, of my own knowledge, what they were doing; I was not there; I can only tell you what they reported they were doing.

Q. Then you don't know anything about it—you can't state to the jury anything of the condition of the track between these places, except what you observed in passing over, and have indicated to the jury that you did that from the rear end of the car when it was in motion?

A. That is my only knowledge—as I passed over it.

Q. Do you know what weight the rails were that were used from East St. Louis east? Do you know the weight of the rails on the Ohio and Mississippi road?

A. No, sir; they have got much heavier rails than most roads running out of St. Louis.

Q. What is the Evansville?

A. 56 pounds, I think.

Q. What is the Chicago & Alton?

A. I have looked at their rails and they looked to me like 56 pounds; it might be a pound or two less, it is hard to tell.

Q. Now, if this 15-foot rail that broke was the third rail from the switch, why was it put there rather than next to the rail or next to the switch; why would it be put that far away?

A. I don't know of any particular reason for it. It might have been the next rail to the switch rail; I would not be positive.

Q. Supposing it was the third rail from the switch, why was the 15-foot rail put in there?

A. So as to make the joints come opposite the middle of the rails.

Q. Do you put a short rail so far from the switch as that,

80 or did you put it next to the rail—the switch-rail?

A. The general practice is to put it right next the switch rail.

Q. Then if it was the third rail from that, it was outside of the general practice?

A. Yes, sir.

Q. Then how far would the 15-foot rail be from the head of the switch if it were the third rail?

A. The two rails would make about 60 feet.

Q. Now, will you tell the jury the difference in safety between a 15-foot rail and a 30-foot rail; whether a road that is built of 30-foot rails is safer than one which is built of 15-foot rails; and, if so, why?

A. Well, as a general thing, it is better to have the rails as long as possible, because shorter rails generally are more expensive.

Q. Do you know how this 15-foot rail was fastened to the other? Do you know whether it was fastened by a fish-plate?

A. I think it was, sir.

Q. Well, sir, I will get you to state, if you can state positively, that this 15-foot rail that was broke was attached by a fish-plate to the next rail east of it.

A. I could not say, sir. I don't know whether I noticed that.

Q. Now, will you state to the jury what is the purpose of this fish-plate?

A. It is to keep the ends of the rail fast; to secure them together and strengthen the joint.

Q. Would you consider a track so laid with 15-feet rails, or, say, a 15-foot rail laid between two 30 feet in length, not connected by a fish-plate at the end; would you consider that good?

A. No, sir; I would not.

Q. If, then, this 15-foot rail that broke was not connected with the rail immediately east of it with a fish-joint you would say that the track at that particular place was not secure, wouldn't you?

A. No, sir; not necessarily.

81 Q. Would you say it was perfectly safe?

A. It could be made safe without the fish-joint.

Q. Will you state to the jury that it could have been made just as safe without a fish-joint as with it?

A. I don't know but what it could, as far as that goes.

Q. How?

A. By being securely and firmly laid on chairs.

Q. Suppose there was no chair for it to lay on and no fish-joint, what would you say was the condition of that rail?

A. It would have to have a good strong tie.

Q. If you could spike it down and make it as secure as you could with a fish-joint, what is the use of having a fish-joint? What would you want to go to the expense of having a fish-joint if you can make it as secure by fastening it to a chair?

A. It would cost more to fix it without a fish-joint to make it as strong as with a fish-joint.

Q. Will you say as a railroad man to this jury that a rail laid down, fastened down by spikes, without the aid of a fish-joint, in an ordinary way put down, would be as secure as where the rails were put down with fish-joints?

A. No, sir.

Q. You know nothing, then, of your own personal knowledge, as to whether this 15-foot rail was connected with the other one with a fish-joint?

A. I know the rail had fish-joint holes in it. I remember seeing the holes?

Q. Which end?

A. The east end.

Q. How was the west end? Did you examine both ends to see whether the fish-joint holes were there?

A. I don't remember about the west end. I examined the east end.

Q. How many pieces did this rail break into?

A. Five or six pieces.

Q. Where is that rail now?

A. We have it somewhere. I think it is at our shop at Mount Vernon.

Q. That is in Illinois?

A. Yes, sir.

82 Q. Have you got all the pieces?

A. Yes, sir.

Q. You have not got them here?

A. No, sir.

Q. How did it come to break in so many pieces?

A. As one car struck it it would break a piece off, and then the next would break another piece off.

Q. What was your time of running between here per mile, between this place and Belleville, according to your time-table, in 1883, at the time this accident occurred?

A. I don't remember what the time was.

Q. Do you know, of your own knowledge, whether this train on the morning of the accident was behind time or not?

A. I don't remember.

Q. Did you understand afterwards it was behind time from any person, officer, or agent of the company?

A. I don't remember in regard to its being behind time.

Q. Did any one report to you that this train was 30 minutes late when it left Belleville?

A. They may have done so.

Q. Do you recollect them telling you at the time that your foreman, the man who was in charge of your road where this accident happened, that he told the men to get out of the way, that there might be an accident there?

A. No, sir; I don't recollect about his telling them to get out of the way, but the men were working there.

Q. Did the section foreman report anything of that sort to you?

A. No, sir; I never heard anything of that sort.

Q. Now, I want you to state to this jury, or I want to ask you whether you still state to this jury positively, that the east end of that 15-foot rail had holes in it for the fish-plates.

A. Yes, sir; I saw half a hole where the rail had broken in two.

Q. How is a 15-foot rail made? Is it cut in two at the shops or on the tracks?

A. We cut it in two ourselves.

83 Q. When you want a 15-foot rail in a place like this——

A. We always make it ourselves.

Q. You cut a whole one in two?

A. Yes, sir.

Q. You don't manufacture rails yourself?

A. No, sir.

Q. Now, I will get you to state whether you examined so as to tell the jury whether the east end of that 15-foot rail at the place where it had been cut off from the 30-foot rail—whether there was any holes in that end.

A. Yes, sir.

Q. Now, will you state to this jury whether the other end of this rail had holes in it?

A. My recollection is that the west end of this rail was the original end of this rail.

Q. The east end of the rail could not have been the original end of the rail, then?

A. No, sir.

Q. How could you get the holes in there?

A. The trackmen put them in.

Q. And you are satisfied now that these holes were in the east end of that rail?

A. Yes, sir.

Q. How far is it to Mount Vernon?

A. 78 miles from the Union depot.

Redirect examination by Mr. HAMMIL:

Q. Mr. Parker, I will ask you to state what is your best recollection about the position of the rail as to the switch.

COUNSEL FOR PLAINTIFF: That was stated by Mr. Parker in his direct examination.

The COURT: How near was this rail to the switch?

A. As I said before, it is my impression there were two rails between that switch.

The COURT: Two full rails?

A. No, sir; it is customary to put it next to the switch rail, and it may have been next to the switch rail. I may be mistaken;

84 it may have been the second rail.

The COURT: You think there were two rails between the switch and this broken rail?

A. Yes, sir; that is my recollection.

The COURT: Now, the two rails next to the switch—were they full-length rails, about 30 feet long?

A. I think they were 30 feet.

The COURT: Do you know any reason why the 15-foot rail should be in there?

A. Yes, sir; it should be in there somewhere; it was necessary to

cut the rail to that length in putting in a switch so as to make the joints come together.

The COURT: It has to come in somewhere to make the joints even?

A. Yes, sir; there might have been some reason for it; I don't know of my own knowledge, of course.

The COURT: Can you describe the character of the fractures?

A. Yes, sir; there appearrd to be a bubble formed in the casting and it broke in the line of the cleavage.

The COURT: How far from the end of the rail?

A. About eight inches from the south end of the rail.

The COURT: How was the fracture—was it transversely or diagonal?

A. It was lengthwise.

The COURT: What was the size of the pieces of rail that were broken off?

A. Well, the pieces averaged from two to five feet in length, some, perhaps, one and a half feet in length. You could see where the end of the rail was flattened out.

Q. I want to ask you, Mr. Parker, if that rail had any mark or any figure on the end of it, and what that figure was, if you remember.

A. I examined the rail after having seen Mr. Smith at Joliet. I asked Mr. Smith to find out when that rail was made. He
85 said that second-class rails were marked with a figure 2. I examined the rail to see if there was a figure 2, but there was not that figure; but there was, I think, a figure 6.

Q. What does that indicate?

A. He said that represented the number of the heat.

Q. The number of the furnace?

A. Yes, sir; I think so; I think that was the number of the furnace the metal came out of.

The COURT: The critical point of this case is as to that rail.

COUNSEL FOR PLAINTIFF: Yes, sir; we expect to show, as I indicated by my cross-examination, that there never had been any new track put in there since the Louisville & Nashville road took possession of that road.

Mr. HAMMIL: We were not responsible for the condition of the road when it was in the hands of the receiver.

C. R. BARNHART, being duly sworn on behalf of defendant, testified as follows:

Direct examination by Mr. HAMMIL:

The COURT: What is your business?

A. Superintendent of transportation on the Louisville & Nashville road.

Q. How long have you been such?

A. Since the 1st of Jan'y, 1885.

Q. This accident happened in 1883?

A. Yes, sir.

COUNSEL FOR DEFENDANT: He was agent in East St. Louis.

Q. State to the jury how long you have been connected with the Louisville & Nashville R. R. Co.

A. Ever since it took possession of the old Southeastern road.

86 Q. And in what position have you been engaged on the road?

A. I began on the St. Louis and Southeastern railroad and remained there about three months, and I came to Nashville, Illinois, and remained there until the Louisville & Nashville road took possession.

Q. When did you go to East St. Louis to take charge?

A. On the 15th of April, 1881.

Q. You were general agent at East St. Louis from 1881 up to what time?

A. I was local freight agent from April 15, 1881, until the 1st of October, 1884.

Q. Now state to the jury if you knew the condition of this track at this place where the accident occurred on the 23rd of October and prior thereto; and state how and why you know the condition the track was in at that place at that time.

A. Well, I knew the condition of the track, because at the time I lived at Belleville—I lived there from 1881 to 1884, and went over the road at least once a day between here and Belleville and East St. Louis, and sometimes twice, including Sundays, as a rule.

Q. On this road?

A. Yes, sir; on the Louisville & Nashville railroad; on passenger trains and freight trains.

Q. State to the jury the condition of this track on the 23rd of October and prior to that time.

A. The track was good.

Q. State to the jury whether you were on this train that was derailed on the 23rd of October.

A. I was.

Q. Well, state all you know about the derailment of the train.

A. Well, I was riding in the 4th car from the engine, which was known as the air-line smoking car and baggage car combined; I had been riding there from the time we left Belleville until the wreck occurred and the cars jumped the track, and a few moments before they struck the broken rail I was just going to pass

87 into the next coach, one of the cars which was turned over, but I met the trainmaster of the division there; he came through the car along with a coal-dealer, and we began to talk, and I remained standing up by the door in this car when they struck the broken rail and the two cars became ditched and turned over.

Q. As I understand you, Mr. Barnhart, you were in the rear of the coach next to the coach that was turned over and thrown off the track?

A. Yes, sir. I had been intending to go into that coach that was thrown from the track, but when I met these two gentlemen I turned my back to the door. They were sitting down and I stood along-

side of the seat, a little from the seat, and began to talk with them and was standing up by the door, and the first I felt of it I felt a jar when the forward trucks of the car struck the rail. I felt a more severe jar when the rear trucks struck the rail. Then the next thing I knew was the bell cord whipping through the car like a flash in the center of the car. I immediately looked back and saw there was no smoking car between the two cars. I saw there was no car behind the rest. I saw these cars were off the track, and I cried out to those in the car that the danger was over, and the train stopped herself about 100 feet from where the cars jumped off the track. I was the second person to the two cars which were turned over and assisted to get the passengers out of the car, and after we had got them out the trainmaster took the engine and went to East St. Louis to get physicians. He was gone about 20 or 25 minutes. I walked back to this place in the track where the rail was broken and looked at that, but only for about a minute, or not that long, I presume, just to see what was the cause of the accident—to see what I could find out about it. Then I went on with the wounded to the Union depot and got carriages and had them sent to the hotels and taken care of.

88 Q. State if you made any examination of this rail at that time or any subsequent time.

A. Well, I just went and looked at it.

Q. You saw it was a broken rail?

A. Saw that the rail was broken into several pieces; I think 3 or 4 or 5 pieces; I don't remember the number exactly.

Q. Do you know whether any train had passed over that track that morning?

A. Yes, sir; there was a freight train right ahead of the passenger train; about 20 minutes ahead, I think.

Q. State whether the cars were loaded or empty.

A. Well, I presume they were loaded cars, because it was what we call the through train from the South.

Q. State whether or not, sir, that train had any trouble at this point; any difficulty that you know of.

A. I don't think it had; I saw it standing on the side track at East St. Louis when we got there, and nobody seemed to know anything about the accident.

Q. State to the jury if you passed over this track on the morning of the 22nd of October, 1883.

A. Well, I could not say as to that; I may have done so, or I may have gone out on our train the evening before.

Q. State to the jury, to the best of your recollection, when you did pass over this particular track before the accident.

A. Well, to the best of my recollection it was the previous morning or the previous afternoon; I think the previous morning.

Q. State to the jury the condition of the track at that time at that place.

A. The track was all right; I never noticed anything wrong with it; I would certainly be apt to feel it if anything was wrong; I always notice these things. I am not particularly expert in tracks or

anything of that sort, but I would certainly notice any severe jar or break.

89 Q. State whether this was—or what you know about it, whether the track was in a good, safe condition there or what the condition of the track was.

A. Well, I think the track was just as good as it is now; it is a particularly safe and good track; it is not a stone-ballast, it is a part-ballast track, well ballasted and well tied.

Q. Were there steel rails in the track at that time?

A. Yes, sir.

Q. Do you know what this rail was that broke—whether that was a steel rail?

A. I don't know of my own knowledge, but they were all steel rails in there, I think.

Q. Now, state to the jury more particularly about this shock to that train—to the car that you were in—whether the front trucks made much of a jar when they struck this rail.

A. Well, when the first trucks struck the rail, I say we got a jar then, but nothing like the jar we got when the hind trucks passed over; in fact it bounced me up; I was standing up and I had to grab at the door as a means of keeping myself up when the rear trucks struck the rail.

Q. Well, state now from your own knowledge of this kind of jar that the front trucks received—was that the first jar, I will ask you?

A. That was the first jar when our car struck it.

Q. State what your opinion is in regard to whether the train that you were on broke this rail or not.

A. I don't see how it could be otherwise. If the rail had been broken by the freight train it would certainly have been derailed. If the rail had been broken previous to our passing over it, it is likely the two cars that passed before would have been derailed. It is hardly likely that a heavy engine and cars would pass over a rail that was already broken and not go off the track.

90 Q. State to the jury whether the track is all straight for some distance before reaching where the broken rail was and three hundred feet beyond that.

A. I think the track is straight for about two or three miles before reaching there.

Q. Two or three miles east?

A. Yes, sir; the curve began about three hundred feet the other side of the broken rail and this side of the switch; in that neighborhood.

Q. Then you think at that time the engine would reach about this curve when the rear car of the train was at this break? The train being about three hundred feet long, the rear car would be near this broken rail?

A. Yes, sir.

Cross-examination by Col. DYER:

Q. Have you had any practical knowledge in track-building?

A. No, sir.

Q. Never worked on a railroad?
A. No, sir; except as agent.
Q. Except as agent—ticket and freight agent?
A. Yes, sir; and telegraph operator and such things as that.
Q. You think the track is just as safe now as it was in 1883?
A. Yes, sir.
Q. And that it was as safe in 1883 as it is now?
A. Yes, sir; I think it was.
Q. Well, before or after the accident was it as safe?
A. Just before the accident.
Q. You think it was safe then?
A. I do.
Q. Well, if it was right safe what would you think made the train go off?

Counsel for defendant objected to the question.

Q. Now I will get you to state if you went back to these cars after they were turned over.
A. Yes, sir; I was the second person there.
Q. Who was the first?
A. Mr. V. S. Albert, trainmaster.
91 Q. Do you recollect of seeing a Mr. Hesse there at the time?
A. I don't know that I recollect of seeing him; we had some trouble in St. Louis with the strikers, and I think he was a deputy sheriff going in and out on that train.
Q. I would like to know whether you know Mr. Hess or not; do you know the deputy sheriff or deputy marshal of that county—of St. Clair county?
A. I was sworn as a deputy sheriff myself.
Q. Do you know Mr. Hess?
A. Well, I never was introduced to him.
Q. Well, you never was introduced to me, but if I was to meet you out in the hall there you would know me?
A. I would not know your name.
Q. Well, my name is Dyer. Do you know Mr. Hess by name or do you know him by sight?
A. I know there was in 1883 a man by the name of Mr. Hess.
Q. Do you know him now?
A. Well, I don't believe I would recognize him.
Q. Have you seen him to-day?

Counsel for defendant objected to the question on the ground that the matter didn't grow out of his examination.

The COURT: It is preliminary to something, I suppose.

Q. Do you know him now?
A. No, sir.
Q. Have you seen him to-day?
A. Not that I know of.
Q. When did you see him last?

A. In the yard in East St. Louis; the man who claimed or went under that name.

Q. Didn't you go back and didn't you examine the rail in company with Mr. Hess at the time it was broken?

A. Not that I am aware of.

Q. I will ask you if Mr. Hess didn't say to you at the time, Your name is Mr. Barnhart?

A. That is my name.

92 Q. Didn't Mr. Hess turn over the rail with his foot—one of these pieces—and didn't he remark to you, Mr. Barnhart, that it was a bad and defective rail?

A. Not to my knowledge, sir.

COUNSEL FOR DEFENDANT: We object to this testimony.

The COURT: I understand this witness to say that it was broken.

Q. Did you say that to him, and didn't you say to him at that time when he called your attention to the fact that that was a bad rail—didn't you say to him: Never mind; that is none of our business?

A. No, sir.

Q. Did you see Mr. Hess there at all?

A. Not that I know of.

Q. And you never had any conversation with him in reference to this rail at that particular time?

A. Not that I am aware of.

Q. If you had any such conversation would you remember it?

A. If I had known the gentleman and had any such conversation I probably would have remembered it.

Q. Did you have that conversation with either Mr. Hess or any one else?

A. No, sir; not that I am aware of.

Q. Did any gentleman call your attention to the fact that the rail was broken, and that it was rusty in the end, and that it was a bad and defective rail?

A. No, sir; I have no knowledge of anything of the kind.

Q. And you say to this jury that no such conversation as that ever occurred?

A. To the best of my belief, it did not.

Q. Did you see any rusty rails?

A. I did not.

Q. Did you look at it to see whether there was any holes in it?

A. No, sir; I didn't examine as to that.

Q. You didn't look to see what caused the break?

A. No, sir; I didn't make an examination of the rail.

Q. And you didn't have any conversation with Mr. Hess or any one else in reference to the condition of the rail?

93 A. To the best of my belief, I did not have any conversation with any one on the ground respecting the rail at that time.

Q. Did you see Mr. Anthony there at the time—this gentleman—this plaintiff?

A. Yes, sir.

Q. What was his condition there at that time?

A. Well, his head was bleeding considerable and he had a handkerchief tied around his head.

Q. Where was he when you first saw him?

A. I believe he was on the bank at first.

Q. Who helped him into the car to bring him to St. Louis?

A. I could not call the names of those who helped me; we were all assisting the injured persons into the sleeping cars.

Q. What are you doing now?

A. I am superintendent of transportation of the Louisville & Nashville road.

Q. When did the Louisville & Nashville road get hold of this road?

A. I think in 1880; 1879 or 1880.

Q. Were you on the road when it was run by the receiver?

A. Yes, sir.

The COURT: I understand that when this accident occurred or just before when your car passed over you felt a jar, and when you saw what had occurred you went back and looked at this rail and saw the manner in which it was broken, as you have described?

A. Yes, sir.

Adjournment was here taken until the following day, at 10 o'clock a. m.

Met, pursuant to adjournment, March 27th, 1886, when the continuation of the taking of testimony was proceeded with.

V. S. ALBITZ, being duly sworn on the part of defendant, testified as follows:

94 Direct examination by Mr. HAMMEL:

Q. What is your name?

A. V. S. Albitz.

Q. What is your business, and what was your business on the 23rd of October, 1883?

A. Chief train dispatcher on the Louisville and Nashville road. In October, 1883, I was trainmaster.

Q. How long have you been engaged in the railroad business?

A. Since 1872.

Q. In what class of railroad business?

A. Well, telegraph operator, train dispatcher, trainmaster, and in the transportation department.

Q. You say you were trainmaster in October, 1883, on the Louisville and Nashville road?

A. Yes, sir.

Q. How long have you been trainmaster?

A. From September 11th, 1883. I was chief train dispatcher from 11th of February, 1882—that is, on this division.

Q. State to the jury whether your occupation and business called

you frequently over that line of the road and how frequently did you travel over it.

A. Well, while I was trainmaster, almost daily. It would average 5 or 6 times a week on the west portion of the road; it was our heaviest business.

Q. State whether you are acquainted with the track at Rankins', where this accident occurred.

A. Yes, sir. It was a very good track.

Q. How long had you known that track?

A. Well, only to be riding over it regularly from September 11th, but as train dispatcher I knew it. The rails were of steel, and we considered it a first-class track from Mount Vernon to East St. Louis. We had steel rails east of that, and it was good all the way to Evansville.

Q. You say all the way from Mount Vernon the track was steel?

A. Yes, sir.

95 Q. State particularly the condition of this track at Rankin's on and before the 23rd of October, 1883.

A. This track was good.

Q. How do you know that?

A. I know it from riding over it. I passed over it both on freight and passenger trains—in fact, I generally left Mount Vernon on freight and returned on passenger; sometimes I went on passenger and back on special freight or passenger.

Q. Do you remember when you were over this track prior to October 23rd?

A. Yes, sir; I could not give you every date, but I was appointed trainmaster on the 11th of September; on the 12th I remember distinctly of leaving on the Evansville local freight, going to Mount Vernon; on the 13th I took the local freight from Mount Vernon to East St. Louis, returning to Evansville that night. It is almost a daily occurrence for me to be over that road.

Q. Fix the time as near as you can remember, before the 23rd of October, when you were over this particular track.

A. I could not say; it was the 21st or 20th or 19th—one of the three days.

Q. You say that you were over the track between the 19th and 21st?

A. I don't think there was any two days in succession that I was not over this track; I don't think that there was three consecutive days but what I passed over this; it may be that I was working on the time-card.

Q. Confine yourself to the period immediately before the accident.

A. That is the nearest I can say—the 19th or 20th.

Q. Are you satisfied you were over it on the 19th or 20th?

A. Yes, sir.

Q. Now describe the track at that point where the accident occurred. Do you know it?

A. Yes, sir.

96 Q. Describe that track to the jury at that point. State to the jury whether it is a straight track or curved, or state

the character of the road-bed and cross-ties and with reference to the fish-plates, joint spikes, &c.

A. Well, just this side, say about 6 hundred feet this side, of where the accident happened——

Q. You mean west?

A. West of the accident there is a slight curve, and east of there for over a quarter of a mile it is a straight track; the ties were good even after these cars were derailed; there was only one tie taken out; the rails were all first class.

Q. How was that tie injured?

A. It seemed that the wheel which struck it passed the rail, splitting it right through, leaving only a small bit of the tie fastened to the rail; of course, that tie had to be taken out on account of that accident.

Q. You say that that was split by the wheel?

A. Yes, sir.

Q. Otherwise it was a perfect tie?

A. Yes, sir; the tie was apparently new and perfectly sound.

Q. State how the road is ballasted at that place or was at that time.

A. The road at that point is ballasted with slack and cinders. I am confident that that is mostly slack and cinders, both, of course, mixed up with earth.

Q. State to the jury the condition of the road as to safety for all business transacted on it by the company.

A. It is perfectly safe.

COUNSEL FOR PLAINTIFF: I suppose that is not a question for this witness to answer.

The COURT: You may state the condition of the road and the jury will draw their own conclusion.

Q. State, Mr. Albitz, whether you were on this train that
97 was derailed at that time.

A. I was.

Q. What part of the train were you in?

A. I was in the rear—that was, the fourth coach from the engine; that is a combination car, part baggage and part coach. I was in the rear and was sitting facing the two cars that were derailed.

Q. You were in the rear of the fourth coach from the engine?

A. Yes, sir.

Q. That left two coaches behind the coach you were in?

A. Yes, sir.

Q. You were in the last car that remained on the track?

A. Yes, sir.

Q. State to the jury what kind of jar the car received when the front trucks struck this rail.

A. I was sitting with another gentleman, talking to him, and another gentleman was standing with his shoulder to the side of the car, his back was towards the rear of the car, and there was just a kind of a jerk. I noticed the bell cord make a very violent noise; it seemed to me that the portion of the car that we were sitting in

raised up, and I knew that there must be something wrong. I started towards the center of the car and on looking out I saw that we had dropped two cars. The train immediately began to slow up, the automatic brake having been put on by the accident; it is arranged so that whenever a train parts the automatic brake is applied. I then ran to the rear end of the train and dropped off.

Q. You can state what you did.

A. The minute I got to the back platform I saw the two cars lying on their side. I told Mr. Barnhart to have the conductor go and flag any approaching train. When I dropped off the train I should judge we were running about 8 or 10 miles an hour.

Q. At the time you got off?

98 A. Yes, sir. I ran back as fast as I could. I knew we had passed a freight train at Belleville, and I was afraid that might come along pretty rapidly and I wanted to get out our danger signals. I ran back of where the wreck was and I meet some section man. I had a red handkerchief in my pocket, which I told one of them to go and flag with. He went back to his hand-car and got a flag. I immediately returned to the wreck, and the head brakeman came back, and I sent him out with the flag, preferring to depend on him rather than the section man. I was right at the wreck then, and I saw the condition of things in a moment, and the train had backed up to the wreck and the engine went to East St. Louis, running very rapidly, and we were only able to find one Dr.

Q. You obtained physicians and took them out to the wreck to attend to the injured?

A. Yes, sir; I did.

Q. Now, state to the jury how that car, how that train was equipped with appliances for stopping it in case of any accident.

A. With an "A" No. 1 automatic air brake.

Q. State whether they were in good condition.

A. They were, as far as we knew. They had made all the stops without any trouble. We had made our regular stops on that night, and they acted well.

Q. State whether they worked perfectly after the accident and stopped the train.

A. Yes, sir; it stopped the train. We had to bleed the air drums before they could back up.

Q. State in regard to the cars and the rolling stock what condition that was in.

A. They were number one.

Q. Now, state more particularly to the jury about the jar that the car received when the front trucks struck this place.

A. I was not in that car when the front truck struck the place. On our car we felt nothing at all. I didn't feel any-
99 thing. The first notice I had was the jar to our coach, caused by these other coaches leaving the track.

Q. That was the first you received?

A. That was my first impression of it or knowing that there was anything wrong.

Q. You were sitting in the rear of the car?

A. I was sitting right over the rear truck.

Q. When the rear truck reached this place where the rail broke state what kind of a jar or shock you received.

A. The only shock we had was the shock which I attributed to the other cars leaving the track. The first intimation I had of anything wrong was this bell cord and the rear of our car rising under my feet.

Q. What caused that?

A. That, I think, was by the coupling probably becoming uncoupled and the safety chain holding; I think that was the cause of the car end being raised; that is my impression of it.

Q. Was it by the cars parting that you received this shock?

A. No; they were undoubtedly still coupled together by the Miller coupling or by the safety chains; we had both; the safety chain and the Miller coupling was in case the Miller coupling became uncoupled they would still be held safe by the chain, and for that reason we had both chain and the coupling on the cars.

Q. This train was equipped with the Miller couplings and the Miller safety chains?

A. Yes, sir; all our coaches are.

Q. Well, state to the jury now what your opinion is in regard to that rail, whether it was broken by this train on which you were riding that morning, on the 23rd of October.

A. Yes, sir; I think it must have been broken by that train.

Q. Well, why do you think that?

A. Well, I think that—I don't think the other coaches would have gone over as smoothly as they did for one reason. Of
100 course I could not positively state that that rail was intact when we struck it, but I should judge that that freight train, if the rail had had a break in it, the train would most undoubtedly have gone off.

Q. State how long prior to the time your train reached this place in the track had the freight train passed over this track.

A. This freight train I think it was from 15 to 17 minutes; it may have been a few minutes less or more; I don't think it was over that that the freight train was ahead of our train.

Q. 15 to 17 minutes ahead?

A. I think they passed over the track 12 minutes clearing the passenger train; that is my idea of it; they had cleared the passenger train 10 or 12 minutes—or somewere close on there, I should judge—from the time they left Belleville. I remember looking at the train at the time. I could not give you the exact figures, but I should judge it was 12 or 15 minutes ahead of the passenger train.

Q. State whether this freight train passed over that track all right without any accident or injury.

A. It did.

COUNSEL FOR PLAINTIFF: Of course the freight train passed over safely; we don't say that it did not.

The COURT: How long before this accident had this train passed?

A. Do you mean from the time this freight passed over up to the time of the accident?

Q. Yes.

A. I should think about 20 minutes.

The COURT: Within a short time?

A. Yes, sir; within 20 or 25 minutes.

Q. I will ask you to state, as an expert, whether you know about the speed a train is running on when you are riding upon it?

A. I do.

101 Q. How do you know?

A. Well, it is a judgment of mine, I having noticed, having been on trains so often. I have found in running along between stations I have, by looking out, noticed our speed for 1, two, or three miles and timed them, and have found that I could time them within 1 or 2 miles an hour, either passenger or freight.

Q. By actually timing them?

A. By timing them and watching passing objects. I have watched them that way for a mile or two, and I have timed them and can pretty nearly tell the speed if I watch them for 1 or 2 miles.

Q. State to the jury at what rate of speed this train was running on the 23rd of October—this train in which you were riding.

A. From 25 to 27 miles per hour.

Q. What was the time-card speed of that train?

A. About 22 miles per hour between Belleville and East St. Louis.

Q. 22 miles per hour?

A. That is about it.

Cross-examination by Col. DYER:

Q. How did it come to be running 25 or 27 miles an hour?

A. We were held at Belleville that morning caused by the coroner examining the engineer and fireman of the engine that was pulling our train. We were held there 15 or 20 minutes.

Q. What is the time between Belleville and East St. Louis?

A. Do you mean at present?

Q. No; then.

A. It was about—I could not give you the exact time—I should think about 35 or 37 minutes.

Q. What is the distance from East St. Louis to Belleville?

A. It is 14 miles from St. Louis. We allow 2 miles from East St. Louis over to this side, and that would make it 12 miles.

Q. 12 miles?

A. Yes, sir; it may be 12 miles and a half. We generally call it 12 miles.

102 Q. How much late were you in leaving Belleville that morning?

A. Between 15 and 20 minutes.

Q. How long had you been in conversation with this gentleman that was sitting down and the other gentleman that was standing?

A. I was out of the train at Belleville in the sitting-room listen-

ing to the evidence of the coroner. We had to wait there, and in leaving Belleville I entered the head coach or next to the head car and walked back through the sleeper, and finding most of the sleepers occupied by some ladies whose berths were being made up, I continued on into the combination car. I should judge we were about three miles from there at the time I got through. Do you mean from the time I was talking with them to the time of the accident?

Q. Yes.

A. I should judge 15 or 20 minutes.

Q. You were talking to them all the time?

A. No, sir; not all the time.

Q. You were in conversation with these men?

A. A portion of the time.

Q. Will you tell the jury how you can now recollect so well that you observed the time the cars were running in that morning; what called your attention to that?

A. I was looking out of the window as we were passing French Village.

Q. How long before the accident?

A. Well, I should say about 6 or 7 minutes; we had passed French Village. I was looking out of the coach window and I remarked to myself——

Q. Did you speak out loud to yourself?

A. No, sir; I noticed the speed we were running and wondered why the engineer was not trying to make up a little more time while we had this good track. I remarked that he was not doing much better than card time.

Q. Did you speak to the conductor about making up the
103 time before you left Belleville?

A. No, sir.

Q. You thought he ought to have made up the time between there and St. Louis?

A. They generally try to make up lost time on that track.

Q. Did you say that to yourself?

A. I said to myself he was not making more than regular time or not much more. I judged he was running about 25 or 27 miles an hour.

Q. Where do you work now?

A. The L. & N. road.

Q. Where at?

A. Evansville, Indiana.

Q. As train dispatcher?

A. Chief train dispatcher.

Q. How long had you been roadmaster?

A. From September 11th to October 23rd.

Q. Did you ever have any practical experience in building railroads?

A. No, sir.

Q. Did you ever direct or superintend men in making a track?

A. No, sir.

Q. It is not any part of the business of the trainmaster to see about the track; that is the business of the trackmen?

A. That is the business of the roadmaster, but if I should find a bad joint or a bad piece of track I would very quickly notify the roadmaster of it.

Q. You didn't find any bad track at all, I suppose? Did you ever make a report to the trainmaster?

Counsel for defendant objected to the question.

COUNSEL FOR PLAINTIFF: This witness has been examined as an expert about running trains.

Objection sustained.

Q. Did you ever make a report to the roadmaster about the condition of this road at any time before that?

A. No, sir; I did not. I cannot recollect that I have. We have a supervisor that generally notifies him, and if there is a bad place he has to run the train slow until it is repaired.

104 Q. Did you direct them to run slow?

A. On this particular piece of track?

Q. Any part of that between here and Belleville.

A. Yes, sir.

Q. How long before?

COUNSEL FOR DEFENDANT: I object to the question; I think it is not proper.

Objection overruled.

A. In the last two years.

Q. Did you before this accident happened?

A. I could not answer, because I cannot call any dates, but in the last 2 years I have issued a dozen or a hundred of them.

Q. On this part of the road?

A. On the entire division when there is bad track caused by bad weather, but I cannot positively say when I did that.

Q. Do you pretend to say to this jury that you could—riding over this road between Belleville and St. Louis, sitting in a car talking to another man—that you could tell the condition of the track and the rate the train was going?

A. I could tell whether there was a rough joint or a broken rail.

Q. That is, if it turned the car over?

A. No, sir; it would not have to turn the car over, because if it did I should know that very quickly—that there was something wrong, but it is possible for it to pass over a bad joint and not notice it.

Q. Did you go back and examine the rails?

A. No, sir; I did not take time; I had other duties to perform. I noticed when I ran back to tell the section men to flag any train that might come I noticed the broken rail.

Q. Did you stop to make an examination?

A. I did not.

Q. How many pieces was the rail broken into?

A. I could not say that, either.

Q. There was no other rail broken, was there, beside that?

105 A. That was all. I would not answer that question very pointedly. I didn't stop to look. I was anxious to get out, so as to have any coming train flagged. I wanted to flag the balance of the trains. I didn't stop to examine the rail, but I noticed it.

Q. Can you state now, from your recollection, how many pieces it was in?

A. No, sir; I could not.

Q. Can you tell this jury, from your examination as you went by and saw the rail, as to whether that rail was entirely disconnected from the other rails at either end or not?

A. No, sir; I could not.

Q. Do you know whether there was any part of the rail that was broken that was hanging on the rail immediately adjoining it?

A. I could not say. I didn't stop to examine the ties.

Q. How long did you stop to examine the ties?

A. Do you mean on that particular morning?

Q. Yes.

A. Not at all. I noticed the tie when I ran back.

Q. When did you go back to make the examination?

A. I should judge about 9 o'clock.

Q. The same morning?

A. Yes, sir.

Q. What did you find, then, of the rail when you went to make the examination?

A. I could not say.

Q. Did you go back there at 9 o'clock for the purpose of making an examination?

A. No, sir; I went back with our tool car and wrecking car from East St. Louis to clear the track. The section men were at work, if I recollect. They were putting in a new rail.

Q. Did you go back and examine the condition of the rail at that time?

A. I didn't examine the rail. I noticed this one had split.

Q. Did you notice the other ties?

A. Yes, sir; the other ties were intact and in good condition; that is my recollection.

106 Q. If you noticed the ties will you tell the jury why you didn't notice the rail?

A. I presume I just overlooked it. I never examined the rail.

Q. Did you examine the ties critically?

A. Not for evidence. I walked over the ties and noticed that one was split.

Q. Did you stop to make an examination of the ties?

A. A critical examination?

Q. Yes.

A. No, sir; I made a casual examination, walking slowly over.

Q. At the time you were making this casual examination of the ties did you at that time make an examination of the rail?

A. I saw the rail was broken. The rail was taken out, if I recollect right, when I got there.

Q. Who took it out?

A. The section men.

Q. Do you know where it was at the time?

A. I think it was lying right there near the switch.

Q. Will you tell the jury why it was you examined the ties and didn't examine the rail? What was the reason of that?

A. Well, the examination of the ties was only casual. It was altogether out of my duty. I just only walked over this track. I was more anxious to see the track cleared, and as soon as the track was clear I immediately went; started out on the out-bound passenger train.

Q. When were you ever out at this place afterwards?

A. I think it was two days afterwards I went back. I think I was on that special; I am not certain. I think I was on the special that went back with the superintendent to examine this track.

Q. Did you see the rail then?

A. I believe I did.

Q. Where was that?

A. That was right at the wreck.

Q. How many pieces did you find when you saw it 2 days afterwards?

A. I cannot remember how many pieces.

107 Q. Did you make a critical examination of the rail?

A. I did not.

Q. What superintendent was with you?

A. C. O. Parker, the assistant, and Captain L. Howell was there.

Q. You two together went and got off the train?

A. No, sir; Mr. Howell, who has been here, Mr. Parker, and the roadmaster, and I think there was one or two others; we all got off the train. I am not an expert on rails.

Q. Are you on ties?

A. I can tell a new tie from an old one, a sound one from a rotten one.

Q. Can you tell whether it is broken in one piece or 4 pieces?

A. Do you mean the rail?

Q. Yes.

A. If it was 4 pieces and I saw it was 4 pieces I should know it.

Q. Do you think it was any more?

A. I could not say. If you want me to tell you what I think I can do so.

Q. You have been thinking a good deal.

A. You are making me.

Q. I am trying to get you to state what you know. One would think from your testimony that you are an expert on ties. I want you to explain to the jury how you came to notice the ties so closely and didn't look at the rail.

A. I am not an expert on ties and rails.

Q. Then you stated to counsel for the company that this road was in splendid, first-rate condition, in your judgment?

A. In the judgment of railroad men.

Q. Who has experience in that particular regard?

A. I am an expert; I am a pretty fair judge on account of my riding over the road.

Q. Most anybody could tell when they struck a broken rail?

A. I should judge so.

Q. Do you know, of your own knowledge, sir, when the track was put down there?

A. I do not.

108 Q. Do you know when the rail that was broken was put down on that road?

A. I do not.

Q. Are you sufficiently experienced in railroad matters to tell this jury how long a rail 52 pounds weight to the yard will last on a railroad? Do you know anything about that?

A. No, sir.

Q. With twelve trains running over it?

A. I could not say.

Q. You don't know when this road was put down?

A. No, sir.

Q. Did you have anything to do with it while it was in the hands of the receiver?

A. No, sir.

Q. Your first connection with the road was on the 11th of September, 1883?

A. Well, in 1872 I was billeted at Carmi as telegraph receiver.

Q. That was when it was in the hands of the receiver?

A. Yes, sir.

Q. I am asking you about your connection—your first connection—with the L. & N.

A. With the L. & N. on this division was February 11th, 1882.

Q. You noticed particularly that this was ballasted with cinders and slack when you went over this road casually?

A. No, sir; not when I went over this road casually. I have known it all along, that it was made of cinders and slack.

Q. At this particular place?

A. Yes, sir; through the section; that is my recollection; it was cinders and slack.

Q. What is slack?

A. Slack is coal dirt or coal dust and some little slate in it.

Redirect examination by Mr. HAMMEL:

Q. You can state to the jury why you were particularly interested in seeing that the ties on the track were in proper condition after the accident.

109 COUNSEL FOR PLAINTIFF: He has stated that already.

A. To get my trains in motion, to get them by safely and as quickly as possible.

The COURT: For other trains to pass over?

A. Yes, sir.

Q. The broken rail had been laid on one side and you didn't look for that at all?

A. No, sir; I didn't have time.

The COURT: You say the new rail was put in when you went up there?

A. That is my recollection; I rode up over that track.

The COURT: Of course you could not get another train over unless you had a new rail in there?

A. No, sir; the train I was out on there was a train that had indefinite rights; they could not start another train until we returned to East St. Louis, so I immediately started back to start our morning passenger train.

Q. You state that you observed that the engineer was not making up time that you thought he ought to. I want to ask you if you remember why he was not able to do that, to make up the time?

A. I only remember from a conversation with him.

Q. If you know anything, of your own knowledge, as to the condition—as to what was the condition—of the track that morning, whether there was any frost or anything of that kind to interfere with the wheels, I wish you would state it

A. I didn't look out to notice that, but I notice he was not making much more than the ordinary running time.

Q. You could tell whether there was a frost without looking out, could you not?

A. I don't recollect; I could not answer that question.

110 THOMAS FINCHER, being duly sworn on the part of defendant, testified as follows:

Direct examination by Mr. HAMMEL:

My name is Thomas Fincher.

Q. Where do you live?

A. In East St. Louis.

Q. What business were you engaged in on October 3rd, 1883?

A. I was passenger conductor for the L. & N. road, on the St. Louis Division.

Q. How long have you been engaged in the capacity of passenger conductor on the L. & N. railroad?

A. Almost two years.

Q. How long have you been engaged in the railroad business?

A. I think about 10 years; I went on the road in 1873.

Q. In what capacity?

A. As brakeman.

Q. State the different positions you occupied on the road.

A. Well, I served as brakeman for about 3 or 4 years; then I ran a freight train until I was promoted to passenger conductor; I don't remember the exact time.

Q. You are not now in the employ of the company?

A. No, sir.

Q. State to the jury, as passenger conductor, how frequently you

would pass over the track—this particular track that we are investigating now—3½ miles from East St. Louis, at Ranken.

A. Well, every day. We ran two weeks on the day run and two weeks on the night run.

Q. How long prior to October 23rd had you been passing over that track every day?

A. I think I was off the road about two months, probably, in the 10 years I have been going over that track right along.

Q. You were over it pretty frequently, with the exception of these two months? When was this time you were off?

A. When Mr. Shepherd had control of the Southeastern.

111 Q. Several years before?

A. Yes, sir.

Q. Then for every day in the year or in two years prior to October 23rd you had been passing over it daily?

A. Yes, sir.

Q. State to the jury from your knowledge what condition that track was in on the 23rd of October and prior to that time at that particular point.

A. Well, we had always considered that track in good shape, as far as I know anything about tracks.

Q. State how it was ballasted there—with what it was ballasted.

A. It was ballasted with coal slack and cinders and the rails were steel.

Q. State to the jury its condition as to smoothness.

A. Well, the track was smooth as far as I know; we always considered it a good track.

Q. Do you know what train was ahead of you on this morning?

A. I think it was No. 18, if I recollect right.

Q. What was that?

A. A freight train.

Q. Do you know about how many minutes it was ahead of you?

A. No, sir; I do not.

Q. Well, from the time card?

A. I didn't look at the register that morning, but I know that they were ahead of us.

Q. Did you, when you reached this point—did you find that the freight had passed over it safely?

A. Yes, sir.

Q. What portion of the train were you in when the accident occurred?

A. I was passing through the L. & N. sleeper—the third car from the engine; we made a stop at French Village, 7 miles from St. Louis.

Q. How many cars were there to that train?

A. 6 cars to the train; we made a stop at French Village and picked up a passenger.

Q. State to the jury the distance from French Village to

112 this point where the accident occurred.

A. Well, I suppose, it is about 4 or 4½ miles. We picked up a passenger at French Village. I was back in the air-line sleeper—that

is the last sleeper in the train—and the brakesman came back and told me we had picked up a passenger at French Village. I got up and went forward into the forward part of the train; then I went through the L. & N. sleeper. I felt the engineer put on his air. I walked out through the car and looked out to look ahead and the train was almost stopping and did come to a stop. I supposed there was something ahead. I kept looking ahead and he motioned, pointed back, and I turned around and looked back and saw that there were two cars turned over.

The COURT: The two rear cars?

A. Yes, sir; the sleeping car and coach.

Q. How far do you think the train ran after the two coaches were turned over?

A. I think about 250 feet; I would not be positive about it.

Q. State to the jury how that train was equipped and what kind of a brake.

A. The best automatic brake.

COUNSEL FOR PLAINTIFF: I cannot see any point in arguing that question.

The COURT: I understood at the beginning that there was this automatic brake on the machine.

Q. Please state to the jury what kind of a shock or jolt the car you were in received at the time you passed over.

A. I didn't notice it at all; I knew nothing about it until I felt the air brake come on. I can always tell when the air brake is used, and I was looking ahead. I thought there was something ahead. I saw the engineer and he was looking back; he was standing up in the cab and pointing his finger back, and I looked around and saw the cars in the ditch.

Q. I understand you to say you received no jar or jolt that
113 was perceptible?

A. No, sir; I knew nothing about it until I looked back—that was from the third car from the engine; I was in the sleeping car.

Q. In regard to the speed of your train, state to the jury, if you please, in your opinion, at what rate of speed you were running that morning at this particular point.

A. I don't think that we were running faster than 25 miles an hour, because it was a very bad rail that morning.

Q. What do you mean by that?

A. There was frost on the rail, or a dew.

Q. On the rails?

A. Yes, sir.

Q. Well, you can state what you know about the running of the train.

A. I asked the engineer why he was not running faster. He said, We have a very bad rail.

Q. What do you mean by that?

A. That the engine slips and that you cannot make as good time as you can when the rail is dry.

Q. Bad from the frost or dew?
Q. Yes, sir; that is what I mean.

Cross-examination by Col. DYER:

Q. Had you made any examination of the track at the particular place where the accident occurred any time shortly prior to the accident?
A. No, sir; I had not.
Q. When had you, prior to that time, been off of the train at that particular point?
A. Well, sir, I could not tell you exactly; I suppose before I went to running the passenger train I might have side-tracked there.
Q. How long had you been running a passenger train when this accident occurred?
A. I think it was almost two years.
Q. Now, during the two years you were running passenger trains had you been off of that train to inspect and examine the
114 track at this particular place?
A. No, sir.
Q. Was there a switch in there during the time you was on the freight?
A. Yes, sir; there was a side track at Rankin.
Q. Did you see men there at work that morning when you went by?
A. No, sir; I didn't see them as I went by.
Q. Did you come back?
A. I did as quick as I could back the train up.
Q. You saw Mr. Anthony there, did you?
A. I think I saw some gentleman there who was pretty badly cut up; I presume his name was Anthony.
Q. I will get you to state whether you made any examination at that time of the rail that was broken?
A. I did not. I had other matters to attend to. I was looking after the passengers. I was afraid the sleeper would catch fire.
Q. Did you subsequently make an examination?
A. No, sir.
Q. You never went and looked at the rails?
A. I didn't pay any attention to the track. I didn't have time. It was not my place.
Q. Didn't you pay any attention to it before that?
A. No, sir.
Q. There was a frost that morning on the track?
A. Well, it was dew or frost; the rail was damp.
Q. How late were you in leaving Belleville?
A. 15 or 20 minutes.
Q. Do you remember remarking to a passenger, who called your attention to it at the time, that you were 20 or 25 minntes late, and you remarked that you could make up that time between that and St. Louis?
A. I do not. I have no recollection of that.

Q. You may have said so?

A. It is possible I might; we are often asked about such things, and very often we are not very particular in our answers—more to give a man satisfaction and to keep them from asking us every 5 or 10 minutes.

115 Q. That is to put him off?

A. Yes, sir; so as to encourage him and make him believe we will not be late.

Q. You would not knowingly misrepresent facts to any passenger on that road?

A. No, sir.

IRWIN CARR, being duly sworn on the part of defendant, testified as follows:

Direct examination by Mr. HAMMEL:

My name is Irwin Carr.

Q. What is your occupation?

A. Locomotive engineer.

Q. On what road?

A. The L. & N. road, St. Louis Division.

Q. On the L. & N. road, St. Louis Division?

A. Yes, sir.

Q. How long have you been engaged as locomotive engineer on that road to St. Louis?

A. 8½ years.

Q. Have you been engaged on any other roads besides that road?

A. With the exception of one month, I was on the Belt road, on the other side of the river; that was all.

Q. State, Mr. Carr, whether you were running on the St. Louis Division of the L. & N. road in 1883.

A. Yes, sir; I was.

Q. How long had you been on that road prior to that time, running over the place where this accident occurred—daily?

A. I could not state how long it had been daily.

Q. Well, about how long?

A. I should judge I had been pretty near a year.

Q. State to the jury the condition of the track at this particular point where the accident occurred during that whole year prior to the 23rd of October, 1883.

A. The track was in a good condition.

Q. State what kind of ballast was used in the track at that point.

116 COUNSEL FOR PLAINTIFF: I object to their going into details of the equipment of the road.

Q. You said you were a locomotive engineer?

A. Yes, sir.

Q. And had been running over this road?

A. Yes, sir.

The COURT: As far as your observation went, the equipments were all right?

A. Yes, sir.

The COURT: You knew nothing about this particular rail?

A. No, sir.

The COURT: You never stopped to examine it?

A. No, sir.

COUNSEL FOR DEFENDANT: I was going to say the rail might be perfect, and unless the surface and ballast of the road was in good condition it might be caused from that.

The COURT: That is what I understood. I understood Col. Dyer to say that there was no question about the equipment, but that there was a defective rail that ought to have been repaired. He does not say that the accident occurred from bad equipment, but it occurred from a bad rail, which he thinks you ought to have known. I only did this to shorten the inquiry. There is nothing practically outside of that. It is a very narrow inquiry. Here is a locomotive engineer. Of course he has his own life in his hands. He expects everything to be safe as well as the passengers do. He was running over this road, and everything was right as far as he observed.

COUNSEL FOR PLAINTIFF: If Col. Dyer will say that he only claims that the rail was defective that is all right.

COUNSEL FOR DEFENDANT: The petition counts on that, and we cannot go outside of our case.

The COURT: The whole controversy from the beginning is this, and there is where the whole case rests, and it is no use bring-
117 ing the matter up for inquiries: Here is a rail that was broken. It broke under some circumstances. Was it a rail that was fit to be there, which the railroad company ought to have examined and there put another one in, or was it a good one? The proposition of law, the whole thing, turns on that one question. I simply mention this so that you can direct your inquiry directly to that point.

Q. Mr. Carr, I will ask you to state to the jury what shock or jar, if any, you felt on your engine in passing over this rail on the morning of the 23rd of October.

The COURT: You were running the train on that morning?

A. Yes, sir. It was very slight. I never paid any attention to it. It was more like as if we had gone over a little low joint. I never would have paid any attention to it if it hadn't been for the coupling breaking between the cars; but for that I might have gone over the track and never noticed it. I should have gone right straight along.

Q. State when the front trucks of the engine struck the rail, if you felt anything at all.

A. I never felt anything until the back pair of drivers went over. That is the pair we sit right over. I didn't feel anything when the other went over.

Q. They are right under where the engineer sits. When the front ones went over you didn't feel any jar at all?

A. No, sir.

Q. State to the jury where the weight of the engine would be—whether it would be forward or whether it was behind, where you were sitting.

A. The biggest part of the weight of the engine sits on the driving wheels.

Q. Where are they?

A. They are the two back pair of wheels of the engine. I am speaking now of 8-wheel engines.

Q. What kind of an engine was this?

COUNSEL FOR PLAINTIFF: We are wasting a great deal of
118 time talking about the engine. I don't think that has anything to do with the case.

Q. You say when the front trucks of the engine passed over you felt a perceptible jar of no kind?

A. No, sir.

Q. And not until the wheels—what kind of wheels do you call those?

A. The driving wheels; the back pair.

Q. Until the driving wheels—the back pair—passed over you didn't feel any perceptible jar?

A. No, sir; not to amount to anything. There was a slight jar; that was all.

Cross-examination by Col. DYER:

Q. Did you feel a jar before the cars went off?

A. When the back pair of wheels went over I did.

Q. When you went over you felt a slight jar?

A. Yes, sir.

Q. Can you tell the jury, from your experience, what would cause the jar that you did feel?

A. Well, different things would cause that. A low joint would cause that.

Q. Can you tell now, from your experience as an engineer, whether it was from that trouble that it was a low joint or whether it was a broken rail that you passed over?

A. I could not tell from that.

Q. What did you think—what was your best impression as to what was the cause of the jar you received there on the moment in passing over it?

COUNSEL FOR DEFENDANT: That would not be evidence, what his impressions were.

Q. Did you go back to examine the rail?

A. No, sir; but I went back there.

Q. Did you examine the rail?

A. No, sir.

Q. Did you examine the track where the cars went off?
A. Not particularly.
119 Q. Was there any more than one rail broken?
A. I didn't notice; I noticed a couple of pieces of rail lying around there about two or three feet long.
Q. Did you notice to see whether there was any more than one rail broken?
A. No, sir.
Q. Was the rail entirely out when you went back?
A. I could not say that, either.
Q. Do you know whether any portion of the broken rail was still on the track when you went back?
A. No, sir; I didn't notice that; I noticed a couple of pieces lying on the ground.
Q. Did you notice the condition of the rails?
A. No, sir.
Q. You don't know how long that rail had been in there?
A. No, sir.
Q. Can you state to the jury whether it was your engine that broke the rail or whether it was the engine that went over before you; what is your best impression?

Counsel for defendant objected to any impression of the witness.

Q. What is your judgment?
A. If the engine that went over before had broken it it would not have been there when we got there.
Q. What do you think did break it?
A. I don't know; I think we broke it.
Q. Do you know what part of your train did break it?
A. If anything did break it it must have been the pair of driving wheels.
Q. That is, the engine wheels?
A. Yes, sir.
Q. Then, that breaking it, would you say your engine had broken it in 3 or 4 places?
A. No, sir; we might just have made a single crack and that might have caused the jar.
120 Q. What called your attention to that; why do you recollect that now?
A. The circumstances attending it afterwards.
Q. That called it to your mind?
A. Yes, sir.
Q. What was the condition of the track for making time that morning?
A. Good—well, as far as the track was concerned, but a bad rail; the rail was slippery. I was unable to get along well that morning.
Q. It is down grade from Belleville to the bottom?
A. Yes, sir; it is down grade to the bottom.
Q. Was it level or down grade where the accident occurred?
A. Level.

Q. How far had you been off the down grade before you struck this level place?
A. About two miles.
Q. It was all level there?
A. Yes, sir.

Redirect examination by Mr. HAMMEL:

Q. I want to ask you with reference to the speed.
A. We were not running over 25 miles an hour that morning.
The COURT: What is your ordinary speed?
A. What the card calls for; the figure, I think, is not quite 25 miles an hour.
The COURT: What is your ordinary speed?
A. That is what the card calls for.
Q. At that time?
A. Yes, sir.
Q. You say the track was a little slippery that morning and you could not get along fast?
A. Yes, sir.

121 CHARLES CROWDER, being duly sworn on the part of defendant, testified as follows:

Direct examination by Mr. HAMMEL:

My name is Charles Crowder.
Q. What is your occupation?
A. Brakeman.
Q. On what road?
A. The L. & N.
Q. What part of it?
A. The St. Louis Division.
Q. How long have you been engaged in that business?
A. Well, about 4 years, I think; I don't remember exactly.
Q. On the St. Louis Division all the time?
A. Yes, sir.
Q. On what train—passenger train or freight train?
A. Yes, sir; on a passenger train.
Q. Were you brakeman on the passenger train coming into St. Louis on the morning of the 23rd of October, 1883?
A. Yes, sir.
Q. How long had you been running over that portion of the track at Rankin, where this accident occurred, previous to October, 1883—daily, or almost daily?
A. Well, I don't exactly know; but a year, or probably 18 months.
Q. State to the jury the condition of the track at that point at that time.
A. Well, the track, as far as I could see, was very good; it was a very good bed and almost straight all along there, and a very nice track.

Q. What part of the train were you in on the morning when the accident occurred?

A. I was sitting in the rear end of the first car; the car next to the engine.

Q. The rear end of the first car?

A. Yes, sir.

Q. State to the jury at the time the car you were in passed over this place where the rail broke what jar you felt, if any.

A. Well, I felt a very light jar. I was sitting on a box,
122 not in a seat; I felt a slight jar; if I had been sitting on a cushion I probably might not have felt it.

Q. You say if you had been sitting on a cushioned seat you hardly would have noticed it at all?

A. I don't think I would.

Q. Do you know about the rate that train was running that morning at this point—the rate of speed?

A. No, sir; I could not tell exactly, because I was not paying very much attention. I was talking first about one thing and then another.

Cross-examination by Col. DYER:

Q. Did you ever see Mr. Anthony, this plaintiff?

A. Well, I cannot remember, sir; I don't remember that I ever have. I might have; I don't remember him.

Q. Do you recollect of seeing Mr. Church, the young man in the office of Hitchcock, Madill & Finkelnburg—the young man who went over to Belleville?

A. I remember some man coming over there, and he said he was from St. Louis.

Q. Do you recollect when that was?

A. It was last summer some time; I cannot tell exactly.

Q. I will get you to state whether, in that conversation that you had with him, you stated that this rail had been broken by a coal train that had passed over before, in your judgment.

COUNSEL FOR DEFENDANT: I don't think you need answer that question. I object to it.

The COURT: It may be competent. It is simply laying a foundation, I suppose, for something else. I don't mean, in an offensive sense, to impeach the witness.

COUNSEL FOR DEFENDANT: Our objection was that it was no part of the *res gestæ*.

The COURT: Do you remember anything about it, Mr.
123 Crowder—this talk with Mr. Church?

A. Well, I remember a few questions he asked me. He wanted to know what I knew in regard to the matter and if I could tell him anything that would benefit him in any way in helping Mr. Anthony out. I told him I didn't know that I could. He asked me about this rail; if I thought it was broken by the train before we passed over, and I told him that I didn't know; that it had been said so, but I didn't think anybody knew anything about it.

Q. Now, will you answer my question? I will get you to state whether you said to Mr. Church in that conversation that the rail had been broken by the coal train that passed over it before. You can answer that question one way or the other.

A. No, sir.

Q. Do you recollect having a conversation with Mr. Anthony some 8 months subsequent to the accident on the car?

A. No, sir.

Q. Do you recollect telling him that the rail had been broken by a train that passed over before the passenger train struck it?

A. No, sir.

Q. You didn't state any such thing as that to him?

A. No, sir; not that I remember.

Q. Nor Mr. Church, either?

A. No, sir.

Q. You are still brakeman on the road?

A. Yes, sir.

Q. Where do you run?

A. Between Evansville and St. Louis.

Q. Did you ever have any conversation with Mr. Anthony at all?

A. Not that I remember of.

The COURT: You are a brakeman, as I understand it?

A. Yes, sir.

The COURT: Did you ever examine this rail at all?

A. No, sir; not at the time. I saw it afterwards—that is, some pieces of it.

The COURT: What was the condition of the pieces?

124 A. Well, it was some time afterwards when I saw them.

Q. How long after?

A. Well, probably 2 or 3 months; I don't remember, it has been so long ago.

The COURT: You are a brakeman, and you didn't pay any attention to the rail, where it broke?

A. Well, I was called out to flag, right after the wreck happened, and was there till after it was cleared up, and they came out on a switch engine to get me.

The COURT: You were a brakemen when the accident occurred?

A. Yes, sir.

Q. You were in the train when the accident occurred?

A. Yes, sir.

Q. You have already described there was a slight jar, as you explain it; the train was stopped, I suppose, when the accident happened?

A. Yes, sir.

The COURT: Then what did you do?

A. Well, as soon as the air went on the brakes went on, and I got up and looked out and saw what was the matter. I went out, and there was so much smoke that I could not tell what it was; it raised so much dust and smoke I could not see far back, and as soon as the train stopped I went back to the rear part of the cars that was on the track and bled the air boxes and backed the train down a

little, and when I got down there I helped an old lady out, and one gentleman helped me to get her out; he was not hurt much; he was a small man with a black mustache; when I saw Mr. Albitz, our trainmaster, start back to flag, and I holloed back that I would go. I went out and was out there until after 12 o'clock.

The COURT: What we want to get at is this: The accident occurred; you, of course, in the performance of your duty, helped everybody you could?

A. Yes, sir.

125 Q. Did you observe the rail; did you look at the rail?

A. No, sir; I did not, only as I ran by it.

The COURT: You saw what caused the accident?

A. Only as I ran by; I just glanced at it as a person naturally——

The COURT: Your attention was directed to other matters?

A. Yes, sir.

By Col. DYER: Did you see enough of the rail to see how many pieces it was in?

A. No, sir; I cannot remember that I did.

Q. Did you see enough of the rail as you ran by to know that one rail was out entirely, and that but one rail had been broken?

A. Well, I don't suppose it was any more than one.

Q. I am not asking you what you suppose. Can you tell this jury whether there was more than one rail broken from your observation?

A. No, sir; I don't believe I could.

Q. You don't know much about it, anyhow?

A. No, sir.

T. C. JUDD, being duly sworn on the part of defendant, testified as follows:

Direct examination by Mr. HAMMEL:

My name is T. C. Judd.

Q. What is your business, Mr. Judd?

A. At present I am a conductor.

Q. Conductor on what road?

A. The L. & N. road.

Q. The St. Louis Division?

A. Yes, sir.

Q. How long have you been engaged in the railroad business?

A. Over 5 years.

126 Q. What position did you occupy on the St. Louis Division of the L. & N. Railway Co. on October 23rd, 1883?

A. Baggageman.

Q. Train baggageman on a passenger train?

A. Yes, sir.

Q. How long did you hold that position prior to October 23rd?

A. I don't remember exactly; two years or more.

Q. State to the jury if you had been running over the track where

this accident occurred almost daily for two years prior to the time of the accident.

A. Yes, sir.

Q. State to the jury what the condition of the track was at that point during that time.

A. Well, as far as a man riding over the track could tell, it was all right.

Q. State to the jury if you were on the train, this passenger train, coming into St. Louis on the morning of the 23rd of October, 1883.

A. I was.

Q. What part of the train were you in?

A. The car next to the engine.

Q. In what portion of the car?

A. About the middle of the car.

Q. State to the jury if you felt any shock or movement—unusual movement—of the car at this place where the accident occurred.

A. Well, I think there was a low joint there.

Q. Well, what kind of a shock or movement did it give to the car?

A. Well, it was a slight shock like a man would receive in a car in passing over a low joint.

Q. Didn't you go back to examine this rail afterwards?

A. Well, I went back to help to get the people out of the wreck.

Q. You didn't particularly notice the rail?

A. No, sir; I didn't particularly notice the rail.

Q. Do you know about what rate of speed the train was running at at that time?

A. As well as I remember now I think we were running about not over 25 miles an hour.

127 Q. What time in the morning was this?

A. Well, I suppose, as well as I can remember now, about schedule time. It was somewhere about 7 o'clock or a little after—between 7 and 8, perhaps.

Cross-examination by Col. DYER:

Q. You made no examination of the rail at all?

A. Well, I went and looked at the pieces of rail after I had helped the people out.

Q. How many pieces were there?

A. I didn't take notice.

W. NEWTON, being duly sworn on the part of defendant, testified as follows:

Direct examination by Mr. HAMMEL:

My name is Wellington Newton.

Q. What is your occupation?

A. Fireman.

Q. On what road?

A. The L. & N.

Q. St. Louis Division?

A. Yes, sir.
Q. How long have you been engaged on that road?
A. About 3½ years.
Q. You were on the road, then, in October, 1883?
A. Yes, sir.
Q. State what position you occupied at that time—in October, 1883.
A. Fireman.
Q. You were fireman then?
A. Yes, sir.
Q. You have occupied that position ever since you have been on the road?
A. Yes, sir.
Q. State what train you were fireman on—what engine.
A. Engine 802—freight train.

Q. How long had you been running over that road prior
128 to October 23rd, 1883, and how frequently?

A. Somewhere about 8 months or a year.
Q. And how frequently—daily?
A. Yes, sir; daily, about.
Q. State to the jury if you know the track at Rankin, where this accident occurred. Do you know the railroad track at Rankin?
A. Yes, sir.
Q. State to the jury the condition of it on the morning of the 23rd of October, 1883, and prior to that time.
A. Well, the road was in good condition on that morning. I was looking out at that time; it was in good shape. I felt no jar in passing over it.
Q. What was the number of your train on that day?
A. I don't exactly know whether it was a special or regular.
Q. I believe the other witness called it No. 18?
A. Yes, sir; I believe it was.
Q. What time did you pass over this track at Rankin on the morning of the 23rd of October, 1883, and in what direction were you going?
A. Going west, ahead of the passenger train; about 16 or 17 minutes ahead of the passenger train.
Q. About 16 or 17 minutes ahead of this passenger train that was derailed?
A. Yes, sir; ahead of her time.
Q. Now state to the jury more particularly how this track where the passenger train was derailed appeared to be when you passed over it. You were on the engine when you passed over?
A. Yes, sir.
Q. State how it appeared to be at this time.
A. It appeared to be in line and appeared to be all right; that is my recollection.
Q. Did your train pass over it safely?
A. Yes, sir.

COUNSEL FOR PLAINTIFF: We don't charge anything about their train not passing over it safely.

129 The COURT: You went over safely?
A. Yes, sir.
Q. How heavy was your train?
A. I don't know. I think about 16 cars.
The COURT: It was a freight train?
A. Yes, sir.
Q. Were they loaded cars?
A. Yes, sir; that is my best impression.

Cross-examination by Col. DYER:

Q. Did you examine the rail—did you go back to see the rail?
A. No, sir.
Q. You never did see it?
A. No, sir.
Q. You were never off there at that particular place before, were you, to see it?
A. No, sir.
Q. Never afterwards, nor didn't know anything about the rail?
A. No, sir; only what I saw going over that line of track that morning.
Q. You didn't see this particular rail?
A. I saw the rail was in line.

NICHOLAS MOOSE, being duly sworn on the part of defendant, testified as follows:

Direct examination by Mr. HAMMEL:

My name is Nicholas Moose.
Q. Where do you live?
A. East St. Louis.
Q. What business are you engaged in?
A. I am a railroad laborer?
Q. Did you ever work on the L. & N. railroad on the St. Louis Division?
A. Yes, sir: I have. I took the first section of the L. & N. Division in 1874. I was on the road before the L. & N. came in.
130 Q. Were you in charge of a section on the L. & N. railroad in 1883?
A. Yes, sir.
Q. What section was that?
A. I was on section 2, in East St. Louis.
Q. How far east?
A. I came to mile post 4 for awhile, and for awhile I came to mile post 6, and then changed back again to mile post 4.
Q. Your work then ran almost up to the city limits of East St. Louis?
A. Inside, on the west side.
Q. And how far did you extend east?
A. East I went to mile post 11; that is 7 miles from East St. Louis.
Q. Beyond Rankin?

A. Beyond French Village; two miles east of French Village.

Q. This portion of the track that is called Rankin switch, where this accident occurred—that was included in your section?

A. Yes, sir.

Q. You were in charge of that on the 23rd of October, 1883?

A. I cannot remember exactly.

Q. You was near at the time of the accident?

A. Yes, sir.

Q. State to the jury when was the last day you were at work before the accident occurred.

A. I could not give you that.

Q. Well, as near as you can.

A. It may have been two or three days before that accident; I cannot tell.

Q. As well as you remember?

A. Yes, sir.

Q. Now state to the jury what condition that track was in at this Rankin switch, where this rail broke, the last time you examined it and saw it.

A. Well, that part of the track where that accident happened, it was just as good as any part of the 7 miles, because that is the place where they take particular attention on account of it being close to the switch. The rail was smooth; I could not see any crack
131 there and no break in it. It was the same quality of steel that is there now; just the same.

The COURT: Fish-plates?

A. Yes, sir.

Q. State to the jury when this 15-foot rail went in there.

A. I didn't put that *road* in; that was put in before. They had to put in a 15-foot rail to get the switch in.

Q. State to the jury why this 15-foot rail was put there.

A. To make a switch there.

Q. State to the jury whether that rail at that place had fish-plates at both ends and fastened with bolts.

A. The rail was fastened at each end with fish-plates and bolts. That I know, because it was strictly the rule. The general rule was to have all the rails fastened with fish-plates, and if they were not done so we would lay ourselves liable to be discharged.

Q. You know it was fastened that way?

A. As far as I know, it was; that was the directions. I have been fireman for 19 years.

Q. You have had a large experience?

A. I have been on 5 different roads.

Q. You say this was a good track?

A. It was a good track; as good as any road I have been on. I know of none better. This is ballasted with coal slack and has good ties, because I was the man who took charge of some ties, and they are there to-day, because I don't think I took any of them out.

Q. You can state to the jury why you were not working there at the time the accident occurred.

A. I was sick. I felt I was not able to attend to the business, and

I didn't know a man that was able to attend to it, and I wrote to headquarters to send a man to relieve me and they sent Mr. Meier.

The COURT: What kind of rail was that?

132 A. Vulcan steel rail; the bell of the rail was 2½ inches and 4 inches web, and as smooth a rail as we had on the section.

Q. You stated before you could see no defect or crack of any kind on this rail?

A. If we should see a flaw in that rail we would be obliged to take it out, because if we didn't it would break and we should lay ourselves liable; we were not allowed to leave any defective rails in.

Q. Do you remember how close this rail was to the switch—whether it was the first rail or the second?

A. Yes, sir; it was the first rail next to the slide rail.

Q. Next to the switch rail?

A. Yes, sir; it was the 4th rail from the toe of the frog.

Cross-examination by Col. DYER:

Q. The toe of the frog—what do you mean by that?

A. There is a toe and a heel of the frog at both ends; when you go into the switch first you go into the toe, and then you strike the heel in going out.

Q. How far was this rail—this 15-foot rail—from the switch, where you turn to go into the switch?

A. It is joined to the switch rail; it is connected with the switch rail with a fish-plate.

Q. At both ends?

A. Yes, sir.

Q. It could not be connected at both ends with the switch rail?

A. It must be connected at one end with the switch rail; you could not put the two ends of the switch rail.

Q. I mean this 15-foot rail?

A. That was connected with the slide rail.

Q. This was connected at both ends—this 15-foot rail—with fish-plates?

A. Yes, sir; connected with the slide rail.

Q. Now, can you tell this jury when that rail was put in there?

133 A. I could not; it was put in there before I came there; that road was put there during General Windsley's time; that road was put in there then.

Q. You went there in 1874?

A. No, sir; I went there 7 years ago the 10th of last Feb.

Q. Then you don't know how long it had been in there?

A. No, sir; I could not tell you that, because that steel was all laid altogether.

Q. You didn't work on the road during General Windsley's time?

A. Yes, sir; I had the section to Cedar City in 1874.

Q. Did you work on the road while Windsley was receiver?

A. Yes, sir.

Q. When did the L. & N. road get hold of this line?

A. I could not tell you that. I was there when they came in

1880. I think they took a part of the road in August, but I could not tell you exactly.

The COURT: How long have you known this rail—how long did you work there?

A. I have been there 12 years.

Q. On this section?

A. No, sir; on 4 different sections.

The COURT: On this section?

A. I was on this section going on 4 years.

Q. From now?

A. No, sir; I quit there last August a year ago.

The COURT: Well, you know when this accident happened?

A. Yes, sir; I had charge of it then.

The COURT: How long had you been in charge of it before that?

A. Well, that section has been taken away from me twice and given back, some other man put there, and I had to go a couple of miles off.

The COURT: How long were you in charge of this place where the accident occurred?

A. Before that accident happened—and that accident happened in October, and I got it the 1st day of September—before that I had a part of that section—a year before that.

134 The COURT: Did you notice this rail, Mr. Moose—did you notice this 15-foot rail when you were in charge of it—did you pay any attention to it?

A. I paid particular attention to the rail, because it was a smooth rail; we have to pay more attention to it because it was near the switch.

Q. You say it was next the switch rail?

A. Next rail to the slide rail.

The COURT: How long was that rail?

A. Well, I didn't measure the rail because I didn't put it in. I should say about 15 feet.

Q. Was there a low joint to it?

A. I don't think there was. I would have been very particular and took it up if there had been.

The COURT: You didn't notice that there was a low joint there; was there fish-plates attached to it?

A. Yes, sir; fish-plates and bolts.

The COURT: To one end or both ends?

A. Both ends of the rail was bolted with fish-plates.

The COURT: How long had you seen it there?

A. Well, I don't know, because I didn't pay any particular attention to it before I had it; it might have been there two years.

Q. How long had you known that rail?

A. I knew that rail about one month before I went.

The COURT: How often did you go over that track?

A. We were obliged to go over it every day or two. I was obliged to make the end of that section that morning ahead of No. 52.

Q. That was this same passenger train?

A. Yes, sir; I can leave it to the engineers; they could see me at the north end of the passenger train every morning.

135 COUNSEL FOR DEFENDANT: You are not in the employ of the company?

A. No, sir.

COUNSEL FOR PLAINTIFF: Did you have a man at work for you by the name of Guttemann at any time?

A. Yes, sir; I don't know whether he was at work there or not.

Q. I am asking you whether he worked with you or not.

A. Well, I hired a hundred hands, and I could not tell you. I sometimes had a man who took one meal and never paid me for it. I could not keep all the men. Sometimes they would stop 10 days and sometimes two days and sometimes four days.

Q. Was he at work there just shortly before you were taken sick?

A. Yes, sir.

Q. Was he with you—do you remember seeing him at your house?

A. Yes, sir; he worked for me.

Q. Who was the assistant roadmaster?

A. D. M. Kelly.

Q. Where did Kelly stay?

A. I don't know where he stayed. He had quarters at Mount Vernon.

Q. How long before you quit work was it that you had seen Mr. Kelly—how long before you were taken sick?

A. Well, I could not tell you. I believe I wrote to him to send a man to relieve me, and he came to see me when I was lying in bed.

Q. I will get you to state whether or not you told Mr. Kelly that the road at that particular place ought to be fixed, and that Kelly told you to put in the switch before?

A. Whoever told you that told you a mistake; it was not so. I never did any work around that switch from the 1st of September till the day that accident happened.

Q. Now I will ask you to state whether you didn't say, in the presence of Mr. Gutteman and other persons, that you had called Mr. Kelley's attention to the road at that place, and that Kelly told you to put in the switch before making any repair on

136 the other road.

A. I don't remember anything about that; that is not in the same place where that accident happened.

Q. You answer my question as to whether or not you said in the presence of Mr. Guttemann and other persons, shortly before the accident, that you had called the roadmaster's attention to the main track at that particular place, and he told you to go on and put in the switch before you mended that?

A. At that particular place?

Q. Yes.

A. That is a mistake; I don't remember that.

Q. You don't remember that?

A. No, sir; I do not.

Q. Well, then, nothing of that sort ever took place at all; no con-

versation of that kind ever took place, that you remember; you never had any such talk about the track with Kelly?

A. It might be that we had such a talk of some place else, but not that place. We often have talked about the track, but I don't remember that I had any talk with Mr. Kelly in regard to this place where the accident happened.

Q. You don't recollect it?

A. No, sir.

Q. Did you have any talk in the presence of Mr. Gutteman about that particular track?

A. I don't remember, but it might have been further off, somewhere else, but not at that place, because I didn't do anything at that place.

COUNSEL FOR DEFENDANT: There was nothing there to fix.

The COURT: Mr. Moose, you are very familiar with this place where the accident happened or were, were you not?

A. I was very well acquainted with the place—yes, sir.

The COURT: Did you notice any defect there in this rail?

A. I did not, sir.

Q. And the way the switch was put in?

A. I did not, sir.

Q. Did you ever tell anybody there was any defect there?

137 A. I did not at that place; I don't think I did; if I did I don't remember it; if I did remember it I would say so; I don't remember it; it is out of my memory.

WILLIAM MITCHELL, being duly sworn on the part of defendant, testified as follows:

Direct examination by J. H. HAMILL:

Q. Where do you live?

A. Mascoutah, Illinois.

Q. What was your business in 1883, and what were you engaged in?

A. I was working by the day on the section.

Q. As a trackman?

A. Yes, sir.

Q. On what road?

A. The L. & N. road.

Q. The St. Louis Division?

A. Yes, sir.

Q. How long had you been working on the road at that time at this particular point between here and Belleville?

A. I was working about three weeks.

Q. Did you ever work there before that?

A. Not right there.

Q. You had been working, then, on this section where the accident occurred?

A. Yes, sir.

Q. You know the place where the accident occurred?
A. Yes, sir.
Q. At Rankin?
A. Yes, sir.
Q. State if you were there on the morning of the 23rd of October, before the passenger train reached there.
A. Yes, sir.
Q. State when you had been there before the morning of the 23rd. Were you there on the evening or the day of the 22nd of October?
A. Yes, sir.
Q. State to the jury what the condition of the road was. Did you see this rail?
A. Yes, sir.
Q. State to the jury what condition the rail and track was in at that point.
138 A. The track was in good condition and the rail was good.
Q. State to the jury all about it. Do you say that you were there before the passenger train arrived?
A. Yes, sir.
Q. How close to the rail were you that morning before the passenger train arrived?
A. Within a rail of it.
Q. Well, state to the jury how many feet that would be.
A. That would be about 30 feet.
Q. State to the jury whether you would have noticed if the rail had been out of place or broken or out of order in any way, from where you were working.

Counsel for plaintiff objected to the question.

The COURT: What did you see there in regard to this rail?
A. The rail was in good shape, as far as I could see.
The COURT: What were your duties as a section man?
A. We were working on the side track.
Q. On the switch?
A. Yes, sir.
Q. State what your general duties were—whether it was to look after the track and keep up the road-bed; state to the jury generally—they don't know what your work was—what are the duties of a section man.
A. Well, it is laying ties, putting in new ties, and laying rails.
Q. Well, keeping the track generally, the surface up in good condition?
A. Yes, sir.
Q. Now, state to the jury whether the condition of this rail and this track, on the evening of the 22nd of October, 1883, and the morning of the 23rd—how it was.
A. Well, it was in good shape, and the rail was good.
Q. Had you been over this particular rail that day with your hand car, on the 22nd?
A. Yes, sir.
Q. What time in the day on the 22nd of October, 1883?

A. It was in the morning, about 8 o'clock, when we went
139 over it.

Q. 8 o'clock on the morning of the 22nd?

A. Yes, sir.

Q. You were within a rail's length of it on the morning of the 23rd?

A. Yes, sir.

Q. How long had you been there before a passenger train arrived?

A. About an hour.

Q. Were you there when the freight train passed there?

A. No, sir.

Q. The freight train had already gone?

A. Yes, sir.

Q. Well, state to the jury now, if there had been any defect or anything the matter with that rail in any way that morning, whether, from your position and the examination of the track, you would have discovered it or not.

Counsel for plaintiff objected to the question.

The COURT: Did you notice the rail as you passed it?

A. Yes, sir.

The COURT: What was its condition?

A. It was in good shape.

The COURT: You didn't discover any defect?

A. No, sir.

The COURT: It was your duty to watch these things, was it?

A. Yes, sir.

Q. You stated that you saw this rail on the morning of the 23rd?

A. Yes, sir.

Q. You noticed the passenger train passing over it, did you?

A. Yes, sir.

Q. Well, you can state to the jury whether you were looking at the passenger train when it passed over it or not.

A. Yes, sir.

Q. The cars all passed over it safely except the two rear cars?

A. Yes, sir.

140 Q. Did you ever look at the rail afterwards?

A. No, sir; I never did.

Q. You fixed up that track afterwards?

A. We went right to work at it.

The COURT: What did you do?

A. We put in a rail there.

Q. A new rail?

A. No, sir; we put in a cut rail—a piece of a rail.

Q. Well, state to the jury whether there was any but this one rail broken there that morning.

A. That was all—one rail.

Q. You put in a rail as soon as you possibly could, so as to allow the other trains to pass over the road?

A. Yes, sir.

Cross-examination by Col. DYER:

Q. Are you still at work for the L. & N. road?
A. No, sir; not now.
Q. When did you quit?
A. I worked awhile on it last summer.
Q. How many pieces was that rail broken into?
A. I could not tell you.
Q. Did you examine it to see?
A. No, sir.
Q. It didn't break any other rail but that one?
A. No, sir.
Q. How many pieces was it broken into?
A. I could not tell you.
Q. Who took the broken pieces from the track?
A. I could not tell you that.
Q. Did you help to do it?
A. No, sir; I was helping to put in the new piece so as to let the other trains pass over.
Q. If you were putting in the other piece in the place of the one that was broken, who took the broken pieces away?
A. I could not tell.
141 Q. You didn't help to do that?
A. No, sir.
Q. Did you examine the rail when it was broken?
A. No, sir.
Q. Have you ever seen it since?
A. No, sir.
Q. You didn't pay any more attention to that rail than you did to any other rail that happened to be in the track over which you were running—you didn't stop to examine that rail any more particularly than any other?
A. We were right at it and we had *got* to examine it.
Q. Did you examine all the rails in your section that day, on the 22nd of the month or the 23rd—did you examine every rail in the road?
A. I suppose we did.
Q. Did you?
A. I did not; no, sir.
Q. How can you single out this particular rail for examination in a track of 7 miles? Why do you say you examined that rail? How is it you came to examine that rail on the 23rd day of the month and on the 22nd, when you didn't examine any other rail?
A. If there had been any crack in that rail we should have seen it.
Q. If there had been a crack in the rail anywhere you would have seen it?
A. Certainly.
Q. Did you look all along the road to see if there was any crack?
A. Yes, sir.
Q. When?

A. That was on the 22nd.

Q. Now, did you examine this rail any more particularly than the balance of the rails?

A. No, sir.

Q. Just about the same?

A. Yes, sir.

Q. You went over this rail with the hand car?

A. On the 23rd?

Q. Yes.

A. No, sir.

Q. How did you go over it?

A. We didn't go over it on the 23rd.

Q. On the 22nd?

A. On the 22nd we did, with a hand car.

142 Q. On the 23rd how did you get there?

A. On the 23rd we were right at it.

Q. You went over that rail when you went to work on the morning of the 23rd?

A. No, sir; we didn't go over the rail.

Q. You came from towards Belleville?

A. Yes, sir.

Q. And got off at the south end of the switch or this end?

A. We came from Belleville.

Q. Where were you at work?

A. Rankin switch.

Q. Were you at work at this end or the other end?

A. This end or about the middle of the switch.

Q. Had you been down, after getting off the car in the middle of the switch—down to the west end of the switch at all, until the accident happened?

A. Before the accident happened?

Q. Yes; before the accident happened.

A. We were right there.

Q. How long is this track that is in there—that side track?

A. I could not tell you.

Q. About how long?

A. I guess about three hundred yards.

Q. You were at work in the middle of that switch?

A. Yes, sir.

Q. Then you were about 150 yards from the other end of the switch?

A. Yes, sir.

Q. Now, I want you to tell the jury whether, when you were in the middle of the switch on the morning of the 23rd, you had been at this end of the switch at all that day; and, if so, what were you doing there?

A. Certainly we was at this end.

Q. What were you doing there?

A. We had to lift our hand car off to go to that end.

Q. Where did you get your hand car in the switch—at this end or the other?

A. At this end.
Q. Then you were at work where?
A. About middleways of the switch.
Q. Now, when you stopped the hand car, will you tell the
143 jury when you took that off the track whether it was on the first rail that is next the switch or the second rail?
A. Right at the frog.
Q. How long was your hand car?
A. It is 5 or 6 feet.
Q. Now, then, your hand car didn't come back as far as 30 feet from the frog before you took it off—you was not 30 feet this side the frog?
A. No, sir.
Q. Were you any closer to St. Louis than you were at that moment any time until the accident happened?
A. No, sir.
Q. Well, then, where did you work at the day before—at the same place?
A. Well, I could not remember whether we did or not.
Q. Do you know whether you worked at that switch on the day before?
A. I could not tell you.
Q. Who was the foreman at that time?
A. Paddy Myers.
Q. Were you right near to him at the time the train came?
A. Yes, sir.
Q. Did you hear Mr. Myers say get out of the way?
A. No, sir.
Q. Did you hear him make the remark about the train?
A. No, sir.
Q. You didn't hear him say to get out of the way, that something might happen?
A. No, sir.
Q. You didn't hear him say that?
A. No, sir.
Q. After this accident happened and you put in the cut rail did you notice how the old rail was taken out so that you could put in the new rail?
A. No, sir; we just put in the cut rail.
Q. Did you notice whether there was any fish-plates there?
A. No, sir.
Q. Old rail?
144 A. Well, there was fish-plates in there, of course.
The COURT: I understand you are a practical man. Now, here was a 15-foot rail connected by fish-plates, and it was broken. How did it get loose from the fish-plates? Were the fish-plates broken?
A. I could not tell whether the fish-plates were broken or not.
Mr. HAMILL: This rail that was in the track before the accident—was it connected with the other rails at each end by fish-plates and bolts?

A. Yes, sir.

Recess was here taken until 2 o'clock.

THOMAS LANCEY, being duly sworn and examined on the part of defendant, testified as follows:

Direct examination by J. H. HAMILL, Esq.:

Q. What is your full name?
A. Thomas Lancey.
Q. What is your business?
A. Engineer.
Q. Locomotive engineer?
A. Yes, sir.
Q. On what road?
A. On the L. & N. railroad, St. Louis Division.
Q. How long have you been at work on that division as engineer?
A. I have been there about two years.
Q. In what capacity did you work on the road before that time, if you did work on it?
A. As fireman.
Q. How long as fireman?
A. I had been there about 3½ years.
Q. You have been on the road something over 5 years?
A. Yes, sir; over 5 years.
Q. Were you working as fireman on the road in October, 1883?
A. Yes, sir.

145 Q. Do you know this track at Rankin, 3½ miles from East St. Louis, where this accident occurred to the passenger train in October, 1883?
A. Yes, sir; I know that track well.
Q. How frequently had you been over that track prior to October, 1883?
A. Well, for about one year at that time, since 1882. I was over it some days twice, some days only once, but the greater part of the time I went over it twice a day.
Q. Immediately before the 23rd day of October how frequently were you over it then?
A. Well, about twice a day.
Q. State to the jury the condition of the track at that time.
A. The condition of the track was good; I claim it was a good track.
Q. Were you on the passenger train, on the passenger engine?
A. Yes, sir; I was on the passenger engine that morning.
Q. The engine that was pulling this train that was derailed?
A. Yes, sir.
Q. Now, state to the jury whether you were on the side that the rail broke on.
A. Yes, sir; I was on the side that the rail broke on.
Q. State to the jury what jar or shock you felt on the engine, if any, while the engine was passing over this rail that broke.

A. I felt a very slight jar with a kind of click as the last drivers went over it; I didn't hear anything until then; it was a kind of a click, and there was a very light jar, as if it was two rails rubbing together or a loose joint; of course, I could not tell whether it was a loose joint or the rail was broke at that time, and we went on and didn't seem to think anything of it until the brakes began to set on us.

Q. Well, now, when the forward trucks of the engine struck this particular part of this rail did you feel any jolt or any unusual movement whatever?

146 A. I didn't feel any unusual movement whatever.

Q. What trucks went over it?

A. The engine trucks went over it, and I didn't feel any jar until it got to me; I was over the back drivers. I was looking right out of the window; if I had not been looking out of the window I don't think I should have heard this click.

Q. Had you been looking ahead at the track?

A. Yes, sir.

Q. State to the jury what the condition of the track was as you observed it that morning.

A. The condition of the track was good; it was in line; it was in a straight line; it was about daylight, and I was looking at the track to see how the track was.

Q. State to the jury about the rate of speed that you were running.

A. We were running at a rate of speed somewhere between 25 and 30 miles an hour.

Q. What was the usual time-card speed for that train?

A. Our usual time-card for that train was about 25 or 24 miles an hour; somewhere around there.

Cross-examination by Col. DYER:

Q. After the accident happened did you leave the locomotive?

A. I did. For a small distance we backed up, and I went off for a small distance and they called me back to my post.

Q. You didn't go back to make any examination of the rail?

A. No, sir; I didn't go back to make an examination.

Q. Did you see the rail after that time?

A. I saw the rail just as I was walking back towards where the coaches were; I saw the rail lying on the side track. I didn't examine it; I just looked at it as I was walking by.

Q. How close did you go to the rail?

A. I don't know; the rail was lying on the side track.

147 Q. What were you doing so far back when the cars were turned over?

A. I wanted to go back to see the accident.

Q. But you didn't make any examination of the rail at all?

A. No, sir.

Q. How many pieces do you think it was in?

A. I don't know.

Q. Do you think there was as many as 8 or 9 pieces of the rail?
A. I could not tell you; I don't know.
Q. You supposed when you rode over it was a loose joint?
A. I didn't know whether it was a loose joint or not; I could not tell that.
Q. What is a loose joint? What do you mean?
A. Well, a loose joint is generally two fish-plates working loose that holds the rails together.
Q. Where there was not any fish-plates at all it would be that way?
A. I never saw any road where there was no fish-plates.
Q. If there was no fish-plates would it have the same effect in passing over as it would if there was a loose joint?
A. I could not tell; I never ran on a road where there was no fish-plates.
Q. You didn't examine the rail to see how securely it was fastened, and if there was fish-plates at either end of this 15-foot rail?
A. No, sir; I never examined the rail.
Q. You went back immediately to your post?
A. Yes, sir; I was called back and had to go back to my post.
Q. You know nothing at all about the rail?
A. No, sir; I don't know anything about the rail.

148 PATRICK MEYER, being duly sworn on the part of defendant, testified as follows:

Direct examination by J. H. HAMILL, Esq.:

My name is Patrick Meyer.
Q. What is your age?
A. I declare I cannot tell you that. We never keep track of it in the old country; but somewhere between 55, 56, or 57, I guess.
Q. What business are you engaged in?
A. I have been foreman on the L. & N. road.
Q. How long?
A. Well, ever since they took hold of the road I have been there.
Q. How long have you been engaged as trackman on the railroad?
A. I have been a long time. I have been about, I think, for 26 years.
Q. You say you have been working on the track of the L. & N. road ever since the L. & N. took possession of that road?
A. Yes, sir. I worked a couple of years for the Southeastern railroad.
Q. That has been 5 or 6 years ago?
A. Yes, sir.
Q. Where were you working in October, 1883—on the 23rd day of October?
A. Well, sir, I was working at a place called Rankin switch.
Q. At the place where this accident occurred?
A. Yes, sir; where the accident occurred.

Q. Well, state to the jury what are the duties of a section foreman. You were at that time section foreman on the section?

A. Yes, sir.

Q. State the extent of your section—the section that you temporarily had charge of in the absence of Mr. Moose, the regular foreman. State where that section began.

149 A. That is more than I can tell you. I was only there a couple of days on the section, 2 or 3 days, when this accident occurred.

Q. Had you been over this track where the accident occurred on the 22nd of October?

A. I cannot remember the dates.

Q. I mean the day before, had you been over this track?

A. No, sir.

Q. Well, on the morning of the accident where were you working?

A. I told you I was working at Rankin switch.

Q. Close to this rail that was broken?

A. Well, we came in there and put in our hand car in the switch and was in the act of going to work when the passenger train came on.

Q. How near to this rail did you get?

A. 30 feet; maybe 20 feet; I could not say, or perhaps closer. The hand car might run a little below the switch, but I know I came within one length, within one rail of that that was broken.

Q. That would be about 30 feet?

A. Yes, sir; or 28.

Q. State to the jury whether you were looking out ahead of the hand car.

A. Yes, sir; if there was anything wrong I should have noticed it.

Q. State to the jury the condition of that track on that morning.

A. Well, I didn't see anything wrong with the track that morning, any more than any other morning. I saw the track was all right. I saw no broken rail until the passenger train went over it.

Q. How long did you get there ahead of the passenger train?

A. Well, I declare I cannot tell. I guess about 10 or 15 minutes; maybe 20 minutes; something about that; I could not say.

Q. Well, state to the jury the condition of the track.

A. Well, there was a good track there; all good steel and good iron. The rail had been connected with fish-plates to the

150 slide rail where it broke.

Q. Was it the next rail to the switch rail?

A. It was the next rail to the switch rail; it was about 15 feet long.

Q. State how it was connected at both ends.

A. It was connected with strips of iron.

Q. Fish-plates?

A. Fish-plates.

Q. And bolts?

A. And bolts.

Q. State whether or not it was properly fastened.

A. It was all safe, sir; it was properly fastened. I had been working around and saw that.

Q. You stated it was a steel rail?

A. Yes, sir; Vulcan steel.

Q. If there had been any break or defect in that rail that morning, state to the jury whether you would have noticed it or not.

A. I think I should; being so close as that to it, I should have noticed it. If the rail was broken there would be pieces out same as when the passenger train went over, and if the freight went over it all right it showed it was not broken, because if it had been it would be liable to be ditched as well as the passenger.

Q. The freight was just ahead of the passenger a few minutes?

A. I could not say; probably half an hour; from 20 minutes to half an hour or something about that; I could not say.

Q. Did you see the rail after the accident? Did you pick it up and lay it out on one side?

A. It took itself out, because every piece of it was broken.

Q. You took it out and laid it on one side?

A. We picked it up and ordered the general roadmaster, Mr. Robinson, to put it aside and to go ahead and flag any train that might be coming.

Q. You put in another rail there?

A. Yes, sir; I cut another rail and put it in.

Q. I will ask you, Mr. Myer, to state to the jury whether
151 any man representing himself to be from St. Louis and to be connected with some case in the courts here against the company tried to interview you or get you statement as to what you would swear to some time ago.

A. There was a young gentleman came out from St. Louis—I don't know who he was; I think he must be some one belonging to the office—and he asked me if I would make statements to him. I told him I would; that I had no objection. Then he told me after a little who he was, and I sat down on him; I gave him the same as I am giving now.

Q. You told him the facts in the case?

A. Yes, sir.

Cross-examination by Col. DYER:

Q. Mr. Meyer, you hadn't been on that particular track a day or two before this accident happened—that is, at that particular place?

A. On the main track?

Q. No; at this switch.

A. I was working within 20 or 30 yards of it.

Q. How long had you been working there?

A. A day or two before.

Q. Whose place did you take?

A. Nick Moose's. I was in his place; he was sick.

Q. What section did you have in charge at that time?

A. It was section 2 then, sir.

Q. Where was section 2? I mean where were you at work before you went to take Moose's place?

A. I had been working at the other end.
Q. At this same place?
A. No, sir; in Belleville.
Q. When have you been on this switch before you went there to work for Nick Moose?
A. I was working there the day before.
Q. Had you been there at any time before that?
A. Yes, sir.
152 Q. How long before that?
A. The day before.
Q. I mean how long before you went to take Moose's place had you been at this switch?
A. I could not go to the switch without taking Moose's place before I came from Belleville.
Q. You didn't know anything about the track or the switch until you went there to take Moose's place? You didn't know anything about it until then?
A. No; of course not.
Q. Then, whereabouts were you at work at the time the accident happened?
A. I was working right at the end of the switch—within 30 yards of the switch—at the west end.
Q. 30 yards from the west end?
A. 30 yards from the west end; that is where I was putting in some repair iron.
COUNSEL FOR PLAINTIFF: That was on the switch?
A. Yes, sir.
Q. Do you know of your own knowledge about when this rail that broke was put down there?
A. No; I do not, sir. I have no idea when it was put there.
Q. Did you work there? You said you worked there while the receiver had it—while they were running the road?
A. Yes, sir; I used to be foreman in Belleville, but no further out than Belleville.
Q. But you didn't know anything about this particular piece of road until you went out to take Moose's place?
A. We used to work on Sundays there last summer—change the irons—that is, last summer.
Q. Since this accident happened you have put in a great deal of new rails out there?
A. No, sir.

COUNSEL FOR PLAINTIFF: I object to that question.

Q. Did you work there last summer, at this switch?
A. No, sir; I have not worked as far as there.
Q. Have you worked about the switch?
A. No, sir; I have not worked as far as the switch, I told you.
153 Q. Can you state to the jury whether the train was running very fast that morning or not, when the accident happened?
A. Well, that I could not say, sir; I had not been aboard of the

train; if I had been aboard of the train I should know what rate it was running between the stations, as long as I had a watch.

Q. You could not tell without looking at the time?

A. No, sir; I might give a guess and I might be right or wrong. I might say she was running 30 miles an hour and she might not be running over 25.

Q. Did you have any talk with Mr. Moose about the condition of that track at that place before you went to work?

A. Yes, sir; I had a conversation about the track. I told Nick that bed ought to be got up instead of putting in iron; that there would be bad weather, and that they should work on the main track while the weather was good.

Q. What I want to know is, did you have any talk with Mr. Moose, the man that you succeeded—did you have any talk with him about the fixing of that track?

A. Yes, sir.

Q. And about he having talked to the roadmaster about it?

A. No, sir; that is the man I have reference to.

Q. Who did you talk with—Mr. Moose?

A. Yes, sir.

Q. What did you say to Mr. Moose about fixing the track at that particular place?

A. I was not there; it was east of that—about a mile or two east.

Q. A mile or two east?

A. Yes, sir; there was some low joints about 2½ or 2 miles east.

Q. In the talk that you had with Moose, Moose told you that he had spoken to the roadmaster about it and the roadmaster told him to go to work on the switch first?

Counsel for defendant objected to the question.

154 A. No, sir; he never told me that.

Q. Well, I will ask you to state whether at the time this train was approaching that place where you were at that morning who was at work for you there at the time—what men composed your gang.

A. Mitchell, Gutteman, and three more; I don't know their names. I was not there long. I didn't learn all their names. I didn't keep the men's time at all, only just at night. When I came home I would give the time to Moose.

Q. Young Gutteman, he is here?

A. Yes, sir; he worked for me then.

Q. He was one of the gang at that time?

A. Yes, sir.

Q. Do you recollect of making any remark at all, as the train came, to the men to get out of the way?

A. No, sir.

Q. You don't recollect?

A. No, sir; no more than I have made to you.

Q. I will ask you whether or not at the time the train was coming in the direction of the switch, where you were at work, you told the men to get out of the way, that something might happen.

A. No, sir; I did not. I have never expressed myself to any of them that way any more than I have to you now.

Q. I will get you to state whether you had a talk at any time with Mr. Bischoff.

A. Yes, sir.

Q. Julius Bischoff?

A. Yes, sir.

Q. I will get you to state whether at that time, in that conversation at your house, you stated that you had talked with Moose, and that that track at that place needed repair, and that he had received orders from headquarters to put in the switch first or to work on the switch or side track.

A. No, sir; that is false.

Q. You didn't say anything of that sort?

A. No, sir.

Q. I will get you to state whether or not you had had any
155 conversation with this superintendent or the roadmaster in reference to where you should work on that road.

A. No, sir.

Q. From whom did you receive your orders?

A. I received the orders from Moose, and he received them from the roadmaster.

Q. You just took Moose's place?

A. Yes, sir.

Q. You didn't have any conversation with Moose about the necessity of repairing the track at that immediate place?

A. He told me where to go to work. He was telling me what was to be done. I had to go and do that the same as if I received a letter myself from headquarters.

Q. You didn't have any talk with Moose or any conversation with Moose in which he said—he told you he had received an order from headquarters to work on the switch and then repair the main track at that place afterwards?

A. Yes, sir; he received a letter once, he said, from the roadmaster to go and put new repair iron on that track, as I told you before.

Q. Did he say to you in that conversation when you took his place that he was to repair that side track first and then go on the main part of the work—of the track?

A. Yes, sir.

Q. When was that conversation had? How long was that before you went to work?

A. Before I went to work on the side track. That was, I believe—that was only one day from then.

Q. Where did the talk take place?

A. Right in the house.

Q. In whose house?

A. Moose's house. I lived with Moose.

Q. You objected to going there because it was not healthy in the bottom, didn't you?

A. I misunderstand you.

Q. I say when you were asked to go and take Moose's place you objected to go because it was unhealthy down there?

A. Yes, sir; I told the roadmaster that he could not buy me to take that section.

156 Q. Were all these pieces of the rail loose that was broken when you saw them—that is, were they lying off the track, or were they in the track?

A. That I could not tell you—whether there was a piece fastened to the track or not. To the best of my knowledge, they were all loose. There might be one fast, but, to the best of my knowledge, I really could not say whether they were or not.

Q. How many pieces were there altogether?

A. That is more than I could tell you till I counted them.

Q. 10 or 12 pieces?

A. I could not say. Some were 2 feet long and some were less.

Q. The longest was 2 feet?

A. Yes, sir; either 2 or three, I am not sure which.

Q. And they were all off the track?

A. They were lying where the rail broke.

Q. Where did you get the rail that you put down in place of this one?

A. Cut it down on the track?

Q. Did you have a rail there present at that time?

A. Yes, sir; we took some of that iron and we cut the rail.

Q. You cut the rail to put in the place of the other one?

A. Yes, sir; because I wanted to have it fixed for the trains coming from St. Louis.

Q. Do you recollect whether you examined the rail particularly after it was broken? Did you examine the rail?

A. No, sir; I didn't examine it. There was 3 or 4 gentlemen there.

Q. Do you recollect of seeing Mr. Hesse there at the time?

A. No, sir.

Q. Do you know Mr. Hesse?

A. Yes, sir.

Q. You recollect of seeing him there on that day?

A. After the train ran off I believe I did. I think he was in the act of picking up the iron.

157 Q. You saw him looking, then, at the iron?

A. No, sir; I didn't see him looking at it. I saw him some place where the passenger coaches were ditched over. I could not say whether it was the front passenger coach or which, but I saw him around there some place.

Q. Do you recollect of Mr. Hesse asking you at the time why you didn't have the fish-plates in on that rail and of your remarking to him that that was a temporary rail?

A. The one that was broken had been well supplied with fish-plates. He never saw it until it was broken, any more than you saw it. I expect you never saw it, and I don't think he ever saw it either.

Q. Did you ever have any such conversation as that with Mr. Hesse?

A. Well, sir, I don't believe I did, to the best of my knowledge.

Q. Will you say to the jury positively that you didn't say to Mr. Hesse that that was a temporary rail?

A. I will, sir; I never said that.

Q. Did you have any conversation with him at all about the rail?

A. I knew better than that.

Q. You answer my question. Did you have any talk with Mr. Hesse at all about that rail?

A. Not that I know of, I told you.

Q. No kind of talk with him about the rail?

A. No kind of talk about such a thing as that. I know I am not such a d— fool to pass a rail when there was no fish-plates to hold it together.

Q. You didn't have any talk of that sort, then?

A. No, sir.

Q. Neither there nor anywhere else?

158 A. No, sir; I didn't come here to make a false statement for the company or for the opposite side. There is not money enough in St. Louis to pay me to take a false oath to-day, and I am a poor man. I will give as near a true statement as I possibly can.

Q. I am asking you the question—I don't say that you are telling falsehoods.

A. You will have to ask them so that I can answer.

Q. Did you have any talk with Mr. Thomas in reference to this matter about the rail?

A. Well, yes, sir.

Q. And the condition of the track?

A. As I said awhile ago, he was up at the house and he asked me about the condition of the track; I told him and young Bischoff that the track was all right—good steel and good ties and a good level track. They said that they had been told that that rail had been broken for several days before this. Well, any man with any common sense knows that if the rail had been broken for several days before that the trucks could not run on it for several days without being ditched.

Q. Did the freight train pass over that morning before you got to that work?

A. Yes, sir.

Q. You followed the freight train down on your hand car?

A. Yes, sir.

Q. You don't know how far ahead it was of your car—how far were they ahead and how long was it before the train passed?

A. I should think pretty near 25 minutes.

Redirect examination by J. H. HAMILL, Esq.:

Q. You stated you received orders to fix this side track before you did the work on the main track at another point, I understood you?

A. Mr. Moose said he had orders from the roadmaster to put in the iron the first thing.

Q. Before doing the work on the main track?

159 A. He never mentioned where I should go to work on the main track.

Recross-examination by Col. DYER:

Q. After this accident were you sent for to go to Mount Vernon to make a statement?

A. Yes, sir.

Q. Did you see Mr. Wood, the attorney, down there?

A. Yes, sir.

Q. And you were examined by Mr. Wood down there?

A. Yes, sir.

Q. Young Gutteman was there at the same time?

A. Yes, sir.

Q. And the rail was there?

A. I don't know whether the rail was there or not.

Q. Didn't you see the rail?

A. No, sir; the last I saw of the rail was when it was brought in here to St. Louis.

The COURT: You were at work on the switch?

A. Yes, sir; I was at work about 20 yards from where the accident happened.

The COURT: Did you see this rail before the accident happened?

A. Yes, sir.

Q. Did you see any defect in it at all?

A. Not at all, sir.

The COURT: Was your attention called to this rail by anybody?

A. No, sir; no more than you have told me.

Q. Your attention was not specially called to this at all?

A. No, sir; it was as good a looking rail as there was in the track, but in picking it up and examining it you could see there was a flaw in the rail; that is all I heard.

The COURT: When was that?

A. After it had been broken in several pieces.

The COURT: Mr. Meyer, did you see this rail after it was broken—after the accident?

A. Yes, sir.

Q. What was its condition?

A. Well, it was all in little pieces—some a foot long and some a foot and a half long.

160 Q. Into how many pieces do you think it was broken?

A. I could not say how many.

Q. Well, as near as you can remember.

A. Well, maybe 8 or 9 pieces.

Q. It was a 15-foot rail?

A. Yes, sir.

The COURT: Well, how about the fish-plates?

A. It was fastened with fish-plates at both ends.

The COURT: How long after the accident was it before you reached this place—did you go right up to the place of the accident?

A. Yes, sir.

The COURT: At once?

A. Yes, sir.

The COURT: Now, there was this broken rail. Where was the fish-plates?

A. I could not see them. They were gone—some of them; there were pieces there.

The COURT: The fish-plates were broken, too?

A. Yes, sir.

Q. The broken ends of these rails were not still fastened to the fish-plates?

A. They were all turned out, to the best of my information.

Q. The fish-plates and all?

A. Yes, sir.

T. B. ROBINSON, being duly sworn on the part of defendant, testified as follows:

Direct examination by J. H. HAMILL, Esq.:

My name is T. B. Robinson.

Q. What is your business?

A. Roadmaster on the L. & N. road on the St. Louis Division.

Q. How long have you been engaged in the railroad business?

A. About 17 years.

Q. In what capacity?

161 A. Well, assistant roadmaster, assistant engineer, and roadmaster.

Q. How long have you been on the St. Louis Division of the L. & N. railroad?

A. Well, nearly three years, and on the St. Louis and Southeastern—the same road—for about 8½ years as assistant roadmaster and assistant engineer.

Q. State when you became roadmaster of the St. Louis Division.

A. In June, 1883.

Q. And prior to that time you had been assistant roadmaster?

A. Yes, sir; and assistant engineer.

Q. Now, as roadmaster and assistant roadmaster, how often did you pass over the track—this particular portion of the track—where this accident occurred on the 23rd of October, 1883?

A. Well, I passed over the track about twice a week, sometimes once, sometimes twice, and sometimes three times, and sometimes during the year we passed over the track on a hand car on a general inspection—that is, about 4 times in a year.

Q. State to the jury how long before this accident did you examine this portion of the track where the accident occurred.

A. I was over that track on a hand car and stopped at the west end of that switch——

Q. You mean Rankin switch?

A. Yes, sir; about 2 weeks previous with Mr. Kelly.
Q. With Supervisor Kelly?
A. Yes, sir.
Q. State to the jury fully the condition of that track at that time with reference to the rails and ties.
A. Well, that track there at Rankin—both ways of that section—was straight and even and the best track we had on the road at that time. It was ballasted partly with cinders and coal slack, and the track through there. There was about 2 miles on the level, or 1½ miles of straight track.
Q. It is all straight track there?
A. For a mile and over south.
162 Q. You had better use the terms east and west; we have been doing that.
A. Well, east; and about 4 hundred feet west of that point there is a slight curve—one of the slightest curves we have on the road.
Q. It was then straight beyond that for a mile or two?
A. A mile and a half.
Q. Perfectly straight a mile and a half east and for 4 hundred feet west of this place?
A. Yes, sir.
Q. And then there was only a very slight curve?
A. Yes, sir; the slightest curve we have on the road.
Q. State what kind of rails were used in the track there.
A. Well, they were all steel rails on that portion of the track.
Q. What manufacture?
A. This particular rail that broke was Joliet steel of the brand 1875, but it had not been in the track that long.
Q. Do you know how long it had been in the track?
A. Two years previous it was put in the track.
Q. Do you know where the rail was brought from when it was brought there and put in?
A. Yes, sir; from East St. Louis.
Q. Well, prior to the time it was put in there had it been in any other portion of the track?
A. It was very slightly worn, if any. It had been in the track, but it was a good rail.
Q. State what kind of a rail it was at the time you examined that track 2 weeks before the accident.
A. The rail was as good as any rail on any portion of the road—the same height, the same size, as all the steel rails were at that time between East St. Louis and Mount Vernon, Illinois.
Q. State whether there was any perceptible flaw or defect that could be discovered.
163 COUNSEL FOR PLAINTIFF: He can state the condition of the rail, but I object to the manner in which counsel for defendant puts his question.

Q. State the condition of the rail.
A. Well, the rail was in good condition; it was what I call a first-class rail, to all outward appearance. I examined it; it was right

near the switch, and at that time—two weeks previous to the derailment—I got off at that switch and examined it with a view of changing it somewhat—putting in a split switch. I was looking at the lead of the switch and noticed this 15-feet rail, which it is necessary to put in where switches are in consequence of the joints.

Q. What is necessary to be put in?

A. We generally have to put in half a rail when we put in a switch.

Q. Explain why.

A. Where the track of the road is broken, when you come to the end of the switch rail it had to be the same length as the other, so as to make the joints even, so, as I say, it is necessary to put in a half rail, but it is immaterial whether it is put next to the switch or two or three rails away; we generally put it next to the switch.

Q. You say it is immaterial whether it is the next rail to the switch rail or the second one?

A. It is immaterial.

Q. State about how long a rail of that manufacture and that quality will be good with the traffic that was on that road at that time; how many years.

A. Well, we have some of that kind of rail in the track that we are using and it has been used ever since the road was built.

Q. Is it good now?

A. Yes, sir; it is in the track, and if it was not good it would not be there; of course it is slightly worn, but it is safe. It is not
164 on our main track; it is near the side. We have taken out a great many of those rails and relaid them with new rails, but not near this point, but on Berkner's section, where there is a sharp curve. We had the same kind of steel rails that was a little worn, and we have taken them up and put new steel rails in at this point, but this is about 7 miles from this point, but it was at the place where there was a sharp curve, where they wear out in about one-third of the time they do on a straight track.

Q. You have heard the examination of Mr. Meyer. He was asked as to whether he had received written instructions or verbal instructions, I believe, from you or from Moose as to what portion of the track he was to work upon. I will ask you if you gave him or Moose any specific instructions to work on this portion of the main track?

COUNSEL FOR PLAINTIFF: That is not the question at issue here.

COUNSEL FOR DEFENDANT: I will put it that way.

WITNESS: I will tell you all about that without any questions.

COUNSEL FOR PLAINTIFF: You need not state anything about it unless the court says you can do so.

The COURT: You were roadmaster; you may tell what directions you gave as to this part of the road, if any.

A. I think the assistant roadmaster asked me for some iron rails to repair the side track at Rankin. I shipped some iron rails to Rankin and gave directions to the supervisor, Mr. Kelly, that he should take out the old iron in the side track and put in new iron.

It was not new but it was good, and I understood he gave directions to the foreman to change the iron.

Q. Carry out your instructions?

165 A. Yes, sir; but no particular day set to do it. We gave directions and told him to do it at its best advantage, at its most opportune time, but not to neglect the main track to do any work on the sidings; where it was necessary to work on the main track to do it at the first opportunity.

Q. Then if it had been necessary to work on the main track they would not have paid any attention to the switch until they got the work finished on the main track?

A. No, sir; we generally hire a foreman who is generally supposed to know where the work is needed most. We give them instructions generally.

Q. What are their instructions about the main track?

A. We give them general instructions about what they shall do and where they shall work. As we are riding over the track, if we observe the track is getting out of surface, we call their attention to it, and tell them to work with reference to that piece of track on the first opportunity, but, of course, they understand they must not neglect anything.

Q. Well, if there should be any broken rail in the track at any point what would the section men do?

COUNSEL FOR PLAINTIFF: I submit that that is not a proper question.

The COURT: What does he do?

A. He takes it out at once.

The COURT: Does he give you information about it?

A. Yes, sir; he reports it to me at once.

Q. He would not wait to report it to you before repairing it?

A. No, sir; he takes it out and sends a telegram. If he has got no rail there the first thing he does is to fix up a red flag both ways, and then he goes to work and puts in a rail. Then he takes

166 up his red flag and reports to me at the first station. If he did not do that he would not stay very long.

Q. Now, Mr. Robinson, I will ask you as an expert if steel of the best manufacture and apparently perfectly sound is in the habit of breaking and breaking frequently?

A. Yes, sir; I guess there is not a road in the United States but what has a broken rail every month.

COUNSEL FOR PLAINTIFF: I submit that is not a proper question.

Witness continuing: They will break sometimes when you can see no cause for breaking, and the rail will appear smooth and perfect; will be of the best quality of steel, and I have known them to break like everything else.

Cross-examination by Col. DYER:

Q. Did you ever work in a rolling mill?

A. No, sir.

Q. Have you had any practical experience in the making of steel rails?

A. No, sir.

Q. Do you know what is necessary—have you any knowledge of what is necessary—to be done in turning a rail out from the mill, so as to know whether it is in good condition or not?

A. I have seen them roll them and seen them go out; I have never seen them go through all the processes.

Q. Do you know anything about the process?

A. I never made any; I don't know anything about the process particularly.

Q. Now, I will get you to state—you have stated that you have seen rails broken that seemed to be all right; good steel rails that were broken for reasons that you could not explain.

A. I didn't say that.

Q. What did you say?

A. I said I have known steel rails that looked apparently good—as good as the best rails made—that broke, but there might have been an interior flaw there.

Q. Did you ever stop to examine whether there was a flaw
167 in these rails that you have seen broken in your experience?

A. Yes, sir; rails breaking on my road. I generally investigate them.

Q. Did you go to the scene of this accident shortly after it happened?

A. I was there about an hour after the accident.

Q. What became of the rail that was taken out?

A. It was laid on one side for the present time.

Q. How many pieces was it in?

A. 8 pieces.

Q. What length were the pieces generally?

A. Well, they would average about 2 feet.

Q. All seemed to be about the same length?

A. I think there was some probably 18 inches and two feet and two and a half feet.

Q. Was there any other rail besides this 15 feet rail broken?

A. No, sir.

Q. Did you notice any of the rails that remained in the track to see whether they were turned or broken in any way?

A. No, sir; they were not broken; not any of the rails adjoining.

Q. Did you see any evidence on the rail next in the direction of Belleville and connected with this 15 feet rail; did you see any break in that next to the switch?

A. No, sir.

Q. That rail was all secure and sound?

A. It was.

Q. Will you explain to the jury how these rails with fish-plates are put together?

A. Yes, sir; the rails are put together by fish-plates and bolts fastened through the fish-plates and through the rail and these fish-

plates. One end of the bolt has a head on which is fastened on the other side by a nut and screw.

Q. What is the length of the fish-plates—these plates that go on each side of the rail?

A. They vary from 20 to 22 inches.

168 Q. What was the size of these at that particular place?

A. I think they were 22 inches.

Q. How many bolts go through these plates with each rail?

A. 4 bolts in each rail.

Q. That would make 8 bolts in the two rails?

A. No, sir.

Q. There is two on each side?

A. Yes, sir.

Q. 4 bolts in two rails, connected by these fish-plates?

A. There are 4 bolts on each rail—2 at each end.

Q. How large are the bolts?

A. Three-quarters of an inch in diameter.

Q. And the length of them is sufficient to go clean through?

A. Yes, sir; with the washer on the other end.

Q. How are they fastened on the other side—the bolts?

A. They are screwed up with nuts. On one end of the bolt is the head and on the other there is a thread on which a nut is screwed to the washer.

Q. There is a nut that fastens it on one side and the bolt head on the other?

A. Yes, sir.

Q. Now, these were three-quarters of an inch in thickness?

A. Yes, sir.

Q. And sufficiently long to go through both plates and the rail and then screw up?

A. Yes, sir.

Q. Now, at this particular place where the rail was broken in the cut rail—the rail that was undisturbed—did you see any evidence of that rail having been broken or wrenched at that particular place?

A. No, sir; that was in good, perfect order. I didn't see anything wrong with it, and on that account I didn't take it up.

Q. Did you put this rail in yourself?

A. No, sir; it was put in before I got there?

169 Q. Were you roadmaster then?

A. Yes, sir.

Q. Who did put the rail in?

A. Mr. Whelen, foreman of section one, East St. Louis.

Q. Do you know where that rail was from 1875 up to the time it was put in the track, of your own knowledge?

A. No; I do not, of my own knowledge.

Q. Do you know whether it had been used and where it had been used from 1875 up to that time?

A. It had been used in East St. Louis and taken up. We took this rail and put it in this place because it was the same brand of steel that was in there at that place.

Q. Do you know whether the 22 tons of rails there were made in

1875 at the Joliet works and sold to the company as second-class rails—whether those rails were put in the road?

A. No, sir; I don't think I ever saw them.

Q. I am talking about the Southeastern road now.

A. I was not there at that time.

Q. Now, can you tell this jury whether the second-class rails that were made—supposing that there were 22 tons of second-class rails made at Joliet in 1875—do you know whether these were put in any part of the track?

A. I could not tell you; I never saw them; if there was any I don't know it; I was not here then.

Q. How long had this rail been used in East St. Louis before it was taken up?

A. I should judge by the wear of it——

Q. I am asking you about your knowledge—if you know of your own knowledge, not observation, but do you know of your own knowledge how long it had been in use?

A. No, sir; I could not tell.

Q. You had charge of the track at that time, didn't you, in 1877?

A. No, sir.

170 Q. When did you go on there?

A. I had charge of the track in 1878.

Q. Who had charge of the road then?

A. What department?

Q. I mean to say who was running the road in 1878?

A. What department?

Q. The whole road—who owned it?

A. The Louisville & Nashville were operating it.

Q. When did it go out of the hands of the receiver?

A. In 1878.

Q. How long was it operated by the receiver before it went into the hands of the L. & N.?

A. I could not say.

Q. Did you know the road and were you at work on the road while it was being operated by the receiver?

A. Yes, sir.

Q. Were you roadmaster then?

A. No, sir.

Q. Then you don't know where this rail was during the time it was operated by the receiver?

A. No, sir.

Q. How many years did the receiver operate it that you don't know anything about?

A. About one year.

Q. Then under the foreclosure the L. & N. road got it?

A. Yes, sir.

Q. Do you know whether that rail had been put down at more than one place before it was put down where the accident happened?

A. I know it hadn't been in use more than 2 years before it was put down at that place.

Q. In 1883?

A. It hadn't been in use over 2 years before it was put down at that place.

Q. You knew that by looking at the rail?

A. Yes, sir; I know previous to this being used at Rankin it was not in use more than 2 years.

Q. You know nothing only from its looks?

A. No, sir; that is as good as I want.

171 Q. That was at East St. Louis it was used?

A. Yes, sir.

Q. What part of the track did it come from when it was torn up?

A. The portion of the track between the freight house and Cahokee creek.

Q. Did you order that track to be taken up?

A. I laid some new rails there.

Q. What kind of rails did you lay there in place of that?

A. Vulcan steel rails.

Q. What size were they?

A. 4 inches, the same size.

Q. What weight?

A. 52 pounds to the yard; same weight as this one.

Q. What was this rail that was broken—was it a Joliet rail or a Vulcan rail?

A. Joliet.

Q. Will you state why you took up a Joliet rail and put down a Vulcan rail?

A. Because they were continually switching all the time and the rails were getting worn.

Q. Then you took out this rail and put in a new rail because they were switching over it?

A. Not particularly, but there was some rails there that was made—there was some Vulcan steel rails used there and they were longer.

Q. Is the Vulcan steel any better than the Joliet steel?

A. No, sir.

Q. It was the same weight?

A. It was a better rail because it was not worn quite so much; there is a different kind of punch holes in these rails.

Q. Then you took up this rail because it was worn and put in a new rail from the Vulcan works?

A. No, sir.

Q. What was the reason?

A. So as to keep one brand together, the same class of rails; the two rails are punched differently, and if we get the two classes of rails together we cannot strap them together without punching great holes.

172 Q. This was already strapped together—the one that you took up?

A. Yes, sir.

Redirect examination by J. H. HAMILL, Esq.:

Q. Do you know anything about that second-class Joliet steel that he has been speaking of?
A. No, sir.
Q. Was there any of it in the main track?
A. Not that I know of; I never saw any branded second class.
Q. This you used was a first-class rail?
A. Yes, sir.

Recross-examination by Col. DYER:

Q. How do you tell?
A. Because it didn't have the brand of second class on it.
Q. Where do you look to find that?
A. On the end of a rail.
Q. Both ends?
A. Well, they are marked only on one end, and this rail had been cut.
Q. What did it have on the end that was not cut?
A. They generally have the figure 2 on second-class rails.
Q. Was there any figure on this one that you saw at all?
A. No, sir.
Q. You didn't see the figure 6 on it, did you?
A. No, sir; I did not.

(And this was all the testimony-in-chief offered by defendant.)

ADAM GURDIMAN, being duly sworn in rebuttal on behalf of the plaintiff, testified as follows:

Direct examination by Col. DYER:

Q. Your name in full, please.
A. Adam Gurdiman.
Q. How old are you?
A. Twenty years old.
Q. In 1883 where were you at work?
173 A. On the Louisville & Nashville railroad, at work as a section hand.
Q. What section?
A. No. 2.
Q. Where is that?
A. That went down to French Village.
Q. You were at work under Mr. Moose?
A. Yes, sir.
Q. You worked under Mr. Myer, the witness that was here a short time ago?
A. Yes, sir.
Q. How long did you work for Moose, or how long had you been at work for Moose on this work?
A. I was working on the road for about six months anyhow—that is, six or seven months.

Q. Were you at the switch when this accident happened?
A. Yes, sir.
Q. How long before the train—the passenger train—got there did you reach there?
A. Well, I was ahead, I think, of the freight train about twenty or thirty minutes.
Q. You were there before the freight train passed the switch?
A. Well, I think we were there before the freight train passed.
Q. Then you don't know positively?
A. No, sir.
Q. I will get you to state what you did after the accident happened.
A. Well, I went up there. I saw those cars turned over on the road, and I went to help to get the people out of the cars—out to attend to them, such as washing them and helping to get the women out. They were crying and hollering out there, and I went down and helped to put in a new rail. The other rail was broken in pieces.
Q. Did you see that rail that was broken?
A. Yes, sir.
Q. Into how many pieces was it broken?
A. Well, there was about, at least, six or eight pieces.
Q. Did you see, while you were there, how the broken rail was connected with the other two rails at either end?
174 A. I cannot tell that.
Q. You didn't examine that particularly to see?
A. No, sir; I didn't examine that to see whether it was connected or not. I just looked at the rail after it was broke.
The COURT: Did you say you put in a new rail?
A. Yes, sir; I helped to put in a new rail.
Q. That took the place of the one that was broken?
A. Yes, sir.
Q. How did you connect it in place of the old one that was broken?
A. I took notice that there was two fish-plates, I think, that were broken.
Q. Two fish-plates?
A. Yes, sir; I took notice they were broken.
Q. These were all that you took notice of?
A. Yes, sir.
Q. Was there anything necessary to be done about that rail before you put in that new portion? What did you do when you went to put in the new rail?
A. We had to put in a new rail.
Q. Was there any of that old rail on the track?
A. There was some rails there. We put in some new rails all the way along at different places.
Q. Were there any of the pieces of this rail on the track that you helped to remove? Did you help to remove any of the ties or pieces?

A. I don't believe I did, but I had to help to put in the new rail on the side by the switch there. We laid the pieces on one side.

Q. How large were they and how were they broken?

A. Well, they were six or seven inches long, or eight, some of them, I should judge. Some were broken longer and some shorter.

Q. Some were broken off square and some in a different
175 manner?

A. Yes, sir.

Q. Did you notice the end of the rail to see whether the rail was rusted or not at one end?

A. No; but I noticed there was a kind of a flaw—it was cracked—and when it was broken you could see this flaw.

Q. At the end of this rail?

A. All the way through you could see it was cracked.

Q. And that you could see at the end of the rail?

A. Yes, sir; at the end of the rail.

Q. Could you see that by looking underneath the ball of the rail?

A. I don't know. It looked altogether to me like a crack. When I looked at it it looked like it was cracked all through, and like an old crack.

Q. That you could see by looking at the rail?

A. Yes, sir.

Q. Did you hear any talk between Mr. Moose and Pat. Meyer in reference to the work on that switch?

A. Well, there was some talk about fixing the road there, and he said he had orders to put in a switch, and that was what he wanted done; he had orders to fix the road there on account of there being several bad joints along the road that had to be fixed and raised up, but he said he had orders to put in the switch first.

Q. Who said that?

A. Mr. Moose told that to Pat. Myers on that day, so we went out and started to work on the switch.

Q. What did Moose say to Pat. Myers or Myers to Moose about there being bad joints on the main track?

Counsel for defendant objected to the question on the ground of its being incompetent unless attention was directed to that particular part of the track where the accident happened.

Objection sustained.

Q. At this place, certainly, along where this rail was
176 broken?

A. In this particular place?

The COURT: There are a good many portions along the road, I suppose. I want to state to the jury what, in my mind, is pertinent in regard to this matter. If there was a defective rail there which should have been attended to by the company and was not, that is one thing; or if the accident occurred through defective coupling, or whether the accident was one which could not have been foreseen or avoided. The question, I suppose, on this inquiry is to get at the cause of this accident.

Q. State what was said by him in reference to the condition of the track at that particular place where this rail was.

A. Well, he told Pat. Myers, I understand, that Nick Moose had wrote or some one had written a letter to Nick Moose to go ahead and put in the switch.

Q. Put in the switch first?

A. Yes, sir; so we went to work on the switch.

Q. Where was that conversation had?

A. Right at the house.

Q. Whose house?

A. Nick Moose's.

Q. That was the place where you all staid?

A. Yes, sir.

Q. How long was that before Moose himself quit work and gave up to Pat. Myers?

A. Well, Moose he took sick about three days before that, and we went on all by ourselves without Nick Moose.

Q. Did you see the train as it came down—that passenger train—before it got to the switch?

A. Yes, sir; it was coming right down behind the woods. There is a curve there, and we saw it before it got to the switch.

Q. Well, state what, if anything, Myers said to the gang about moving out of the way.

A. He said, "Boys, she is coming on very fast. You had better get out of the way." There was 7 or 8 men, and we stepped on the other side of the switch.

177 Q. You all got off the track?

A. Yes, sir; we all got off.

The COURT: If you hadn't done so you would have been run over, wouldn't you?

A. I guess so.

COUNSEL FOR PLAINTIFF: No, sir; they were on the other side of the track.

Q. Who made that remark?

A. Paddy Myers himself.

Q. Were you sent for to go down to Mount Vernon to make a statement in this matter soon afterwards?

A. Yes, sir.

Q. Who sent for you?

A. Mr. Robinson.

Q. He is the gentleman who was here awhile ago?

A. Yes, sir.

Q. Did you go there and talk to Mr. Wood, the attorney?

A. Yes, sir; I got there in the morning, but I went down the evening before.

Q. Who else was there at the time?

A. Well, Pat. Myers came in in the morning.

Q. And you were examined by Mr. Wood?

A. Yes, sir.

Q. Did you see the rail there at that time?

A. Yes, sir; me and Paddy Myers saw it in a little house they had on the side there. A friend of Myers'—I don't know his name—was with us in there.

Q. You saw the rail there; how was it lying?

A. It was lying on the side towards the wall.

Q. In a box, or in the house?

A. It was not in a box at all.

Q. Well, that was at Mount Vernon, Illinois?

A. Yes, sir.

Q. How long was it after the accident before you were down there?

A. I think it was about two weeks.

Q. About two weeks after that?

A. I am not sure about that.

Q. Have you ever seen the rail since?

A. No, sir; that was the last time I saw it, down there.

178 Q. You were over here last fall?

A. Yes, sir.

Q. At the instance of the railroad company?

A. Yes, sir.

COUNSEL FOR DEFENDANT: What is the object of this testimony and what has that to do with this case?

The COURT: I don't know why you are asking about the whole history of the case from the beginning to the end, but why don't you ask him if he knows anything about this case? If he does let him tell it. That is not strictly in rebuttal, and you cannot go all over this case a second time.

Cross-examination by Mr. HAMMIL:

Q. You say that Moose said to Patrick Meyers that there was some loose joints or pretty low joints?

A. Yes, sir; he said that to Meyers.

Q. But he didn't say that there were low joints under this rail that afterwards broke?

A. No, sir.

Q. On other portions of the track?

A. Along the track, right around there.

Q. But not near this rail at all?

A. No, sir; not where the rail was.

Q. You say that there appeared to be a crack in this rail after it was broken when you saw it?

A. Yes, sir.

Q. You didn't see any crack before it was broken?

A. No, sir; of course if I had seen it before that I would have let them know about it.

Q. You say that Meyers told you that morning when the train was coming that it was coming fast, and he told you to get out of the way?

A. Yes, sir.

Q. Don't you always do that when a train is coming along?

A. We don't get that far away from the side.

Q. You get out of the way of the train?

179 A. Yes, sir; but we stand pretty close up to them very often.

Q. You made a statement to Mr. Wood at Mount Vernon, Illinois, on the 24th of November, 1883, in regard to this rail?

A. Yes, sir; but I don't know what it was.

Q. You stated to him, then, in substance at that time——

The COURT: What are you looking at?

COUNSEL FOR DEFENDANT: I want to show that he stated at this time that he saw this rail on this very morning before the passenger train entered upon it, and the rail was in a sound condition.

The COURT: That is in already.

Q. Did you state that the rail was there in good condition when you saw it that morning, and that you were within thirty feet of it?

A. We saw it was not broke; it was all right when I saw it, but I examined it after it was broken.

Q. You saw it was not broken before the passenger train came on that track?

A. We saw it was not broke.

Q. It was in good condition?

A. Yes, sir.

Q. If it had been broken you would have taken it out?

A. We certainly would.

W. C. HESSE, being duly sworn in rebuttal, on behalf of plaintiff, testified as follows:

Direct examination by Col. DYER:

Q. What is your name in full?

A. W. C. Hesse.

Q. Where do you live?

A. Belleville.

Q. How long have you lived there?

A. For the last 30 years.

Q. What was your business in October, 1883?

A. I was employed by the sheriff of St. Clair county as deputy sheriff in East St. Louis.

180 Q. Were you on this train on which the cars were wrecked and Mr. Anthony hurt?

A. Yes, sir.

Q. What car were you in?

A. I was in the Louisville & Nashville. I went back in the rear, or on the air-line car, but I didn't find any of my friends there that I knew, so I went back into the L. & N. car.

Q. How many cars from the engine were you?

A. I was three cars from the engine. I was in the smoking car, I believe, of the air line.

Q. Were you in the next car to this one that went off?

A. I was right in the center of the car, or near the car that went off.

Q. After the accident happened what did you do?

A. I went there by orders of Mr. Bernhardt. I was detailed up there to protect property at East St. Louis.

Q. I am asking you what you did at the accident.

A. I rendered what assistance I could. Mr. Bernhardt and Mr. Bishoff and several other persons went to help to get the ladies out of the coaches. I got the rail on the track.

Q. Did you examine this one that was broken?

A. Yes, sir.

Q. Well, now, tell the jury what you found.

A. I paid the most attention to getting the persons out of the car; then I went to examine the rail.

Q. State what conversation, if any, you had with Mr. Myers.

A. I said that was a bad rail, and he said it was a good rail. I said to him: Why, there is a flaw which shows right over the top of the rail. It was a crack in it, and it was split down right to the T iron below from the top, right down to the ball. It was split in two; one portion lay on one side and the other on the other side of the ties. The rail was broke into about six or seven pieces.

181 Q. State whether that rust and defect in the rail that you saw came from the top of the rail and whether you could see it by looking at it.

COUNSEL FOR DEFENDANT: After it was broken?

A. No, sir.

Q. You could see it before, or it would not be rusted right through; you could see before that there was a flaw in the rail at the time?

A. Yes, sir.

Q. How many pieces were there of that?

A. Well, there may have been about five or six, or maybe seven, of various lengths—from 10 to 18 inches.

Q. What did Meyers say when you called his attention to that rail?

A. He told me it was only a temporary rail.

Q. That the rail that was there was a temporary rail?

A. Yes, sir.

Q. Did you call Mr. Barnhardt's attention to it?

A. After I went back again Mr. Barnhardt came and he asked me if I had been up there to see the rail. I said yes. I said, "That is a defective rail," and he gave me an answer that it was not our business; that we had no attention to pay to that, but we were to go on and to go back to the train. So we walked back again. He said that didn't concern us, or something of that kind.

Q. Was there any portion of this rail that was on the track, when you got up, fastened to the end of the other rails?

A. Yes, sir; there was a piece about five or six, or maybe seven, feet long fastened to the tie yet.

Q. Was that at the middle of the rail or the end?

A. Well, the end broke off.

Q. I mean the end this way?

A. It was the end towards Belleville that was broken.

182 Q. That was broke off the end this way?

A. The other was still remaining there on the tie.

Q. State whether you observed the end of the rail next to Belleville to see whether there was any fish-plates at that end of the rail?

A. Not to my knowledge. If there was the bolts would have been in yet, but there was no sign of a bolt or anything.

COUNSEL FOR DEFENDANT: I want you to testify to what you know.

Q. Did you notice about that?

A. I noticed that there was no holes in the rail.

Q. In that end?

A. It is generally customary to fasten them with fish-plates.

Q. Have you seen that rail since?

A. No, sir; I have not.

Q. Who was present at this time when you made this examination?

A. Mr. Bernhardt.

Q. Was any one else present besides Mr. Bernhardt?

A. Mr. Myers and several more were around. We hadn't much time, and I didn't pay any attention or any particular attention to it, but I saw Bernhardt and Myers and asked them about it.

Q. At the time this accident occurred were you a deputy sheriff looking after the property of this road?

A. Yes, sir. I was ordered by Mr. Bernhardt to look after the passengers and see to them as much as possible. I saw these men that were working at the section—Gurdimann and several others—and we helped the people out of the cars as quickly as possible, and took their clothes and baggage into the cars of the other train.

Cross-examination by Mr. HAMMIL:

Q. You were in the employ of the sheriff of St. Clair county
183 and deputized by him?

A. Yes, sir.

Q. Did you ever examine this rail before the accident?

A. No, sir; I never did.

Q. You say that there was no fish-plates in the end of this rail?

A. Not to my knowledge.

Q. You don't know what was on the rail when it was in the track; you never saw the rail in the track before the accident?

A. It is generally the case——

Q. I don't ask you for what is generally the case; I want you to answer my question. I say did you see, or did you say now, that at the time before this accident that there was no fish-plates and no holes for a fish-plate in this rail?

A. I am saying that after the accident there was no holes in the rail and no fish-plates in any part of the rail, that I could see.

Q. That is just as true as anything you have said as a witness on the stand.

A. That is just as true, to my knowledge, as anything I have stated, sir.

SIMON STRAUSS, being duly sworn on the part of defendant in rebuttal, testified as follows:

Direct examination by J. H. HAMILL, Esq.:

My name is Simon Strauss.
Q. Where do you live?
A. Belleville, Illinois.
Q. How long have you lived there?
A. I have been living there for about 8 years.
Q. Do you know William Hesse, the last witness who testified?
A. I know him personally.
Q. Do you know his reputation for truth and veracity in
184 the neighborhood where he lives?
A. Yes, sir.
Q. What is that reputation?
A. It is a very poor reputation.
Q. From that reputation, would you believe him under oath?
A. No, sir.

Cross-examination by Col. DYER:

Q. What do you do up at Belleville?
A. I am a watch-maker.
Q. You had a lawsuit with him?
A. I had.
Q. Is it still pending?
A. No, sir; it is settled and decided in my favor.
Q. You gained the case?
A. Yes, sir.
Q. When was that?
A. About a year ago.
Q. You are a watch-maker?
A. Yes, sir.
Q. A good watch-maker?
A. A pretty good watch-maker.
A. I will get you to state if you didn't send a blue letter to Mr. Hesse?
A. Yes, sir.
Q. Look at it and see if you did? (Letter shown witness.)
A. That is the identical blue letter I sent him from the Merchant Detective Association.
Q. When did you get here?
A. I was born here.
Q. At Belleville?
A. No, sir; New York State.
Q. How long have you been in this section of the State?

The COURT: I will cut this short; we cannot waste our time in this way.

This was all the evidence offered.

Plaintiff's Instructions. (*Refused.*)

Whereupon the plaintiff requested and prayed the court to charge and instruct the jury as follows:

The plaintiff asks the court to charge the jury that the throwing of the coach from the track or the breaking of the
185 rail is of itself sufficient to raise a presumption of negligence against the defendant. Public policy requires of the carrier in such cases that it shall affirmatively show that it had taken all usual and practical precautions, as applied to the careful and capable management of passenger railways, to maintain its track, roadway, and appliances for carrying in a safe condition. While its obligation does not rise to the degree of warranting the safety of its track and roadway, the law nevertheless exacts that when an injury occurs to a passenger by an occurrence so unusual and so perilous to human life it shall make it appear that the utmost practical care and diligence had been observed, and that no degree of care and diligence had been observed, and that no degree of care usually and practically applicable to the careful management of like railways would have discovered the defect which probably caused the accident and thus prevented its occurrence, and it is incumbent on the railroad company to establish by evidence, to the satisfaction of the jury in explanation of the cause of the accident, that it had employed the utmost skill, prudence, and circumspection in its business as a common carrier, and, notwithstanding all that, the cause of the accident was not and could not have been discovered and guarded against.

The court is asked to charge the jury that a carrier is bound to exercise the strictest vigilance and the utmost degree of care, diligence, and precaution in conveying passengers to their respective destinations, and this means that he will transport in safety so far as human care and foresight can go.

The plaintiff asks the court to charge the jury that, in
186 addition to the actual outlays and expenses of plaintiff which the injury necessitated, the jury, in assessing the plaintiff's damages, may also consider the pain which he has suffered, physical and mental, the value of his time that he lost or which was likely to be lost by reason of the injury, whether such injury was likely to be permanent or not, and, upon consideration of all the facts proved, ascertain the extent of the injury and award such damages as, in their judgment, will compensate, so far as money can, for such injury.

Which requests so prayed for by plaintiff the court refused; to which refusal of the charges thus prayed the plaintiff, by his counsel, then and there excepted at the time.

The court, of its own motion, charged the jury as follows:

Charge to the Jury.

In the Circuit Court of the United States for the Eastern District of Missouri.

J. B. ANTHONY
vs.
LOUISVILLE & NASHVILLE R. R. Co. } No. 2547.

TREAT, *J.* (orally):

GENTLEMEN OF THE JURY: The principles of law governing cases of this character are very few and very simple. A passenger on a railroad train has a right to suppose that all the appliances connected with his transportation are such as the highest degree of human skill and prudence would furnish. If he meets with an
187 injury through the fault of the railroad company he is entitled to compensation therefor, including all the expenditures by him made in consequence of said injury, together with his loss of time and a proper allowance for any special suffering to which he may have been put, mentally or physically; and, also, the jury will take into consideration whether the injury is permanent or temporary.

Now, in this case it seems—and it is for you to determine, gentlemen, in the light of the testimony—that the injury was caused by a defective rail while this train on which the plaintiff was a passenger was running at such rates of speed as has been presented to you when this rail was hit.

It is the duty of a railroad company to exercise the highest degree of prudence and skill, to determine that everything is safe for transportation. If an accident happens in consequence of a failure to exercise that degree of skill and prudence the company is responsible for what may happen.

On the other hand, a railroad company, like an individual, can do nothing more than to exercise all the skill and diligence known for the purposes of its employment, and having done so, if there is a latent defect, a concealed defect, which that degree of intelligence, prudence, or skill cannot detect, it is not responsible for what may happen. In other words, a railroad company is not an insurer, and, while it is not an insurer that the passengers shall be transported with perfect safety, it is bound, on the other hand, to exercise all of the skill and prudence known to the highest order of intelligence connected with such matters.

If this is done and an accident occurs it has discharged
188 its duty. It is unfortunate that some one should suffer, but, the measure of duty having been discharged as thus stated by the railroad company, the loss must fall where it unfortunately has fallen.

Consequently, this case has seemed to the court all the way through to turn on one question mainly, viz., the character of the rail. Was it a rail not fit to be used, and could the company have known it, for

the purposes for which it was used? If it could, the company was liable for the injury that was caused by the use of such an improper rail.

Second, if it were originally fit for the purposes used, and through some cause or other it had become defective and the company could have detected that defect and the injury was caused, still the company is liable.

I put a great many questions—because it did not seem clear to my mind, though I am not to determine that and the jury are to determine it—as to what was the character of the rail itself and what were its connections with the adjoining rails.

Ordinarily, as stated by the witnesses here, under our modern contrivances for safety, rails on a track are not only fastened by what are known as chairs and ties, but also by fish-plates. I endeavored to ascertain, if possible, the condition of these fish-plates, so that after the accident it might be determined whether there were fish-plates at either end of this short rail. It is for you to say with regard to that. It does not become the court to comment on the testimony. It must suffice for the purposes of this case, so far as the court is concerned, that this accident happened. You have heard the testimony as to how it happened. You have heard the effect upon
189 this rail, broken into sections of several pieces, and if that rail was fit for the work and the exercise of the highest degree of care and attention on the part of this railroad would not have enabled it to detect that it was unfit, as it turned out to be, then the company is not liable. If it was unfit and they knew it, or by extreme care and skill could have found that it was unfit when the injury occurred, then the company is liable.

So practically the question is, Was this a latent defect which could not be detected by the company? If it was, the company is not liable. If it were otherwise, then the company is liable.

Take the case, gentlemen.

To the giving of which charge plaintiff, by his counsel, then and there excepted at the time. Under the charge of the court the jury found a verdict for the defendant.

And on the thirtieth day of March, 1886, within four days after verdict, the plaintiff filed his motion for a new trial as follows:

Motion for New Trial.

In the Circuit Court of the United States in and for the Eastern District of Missouri.

JOHN B. ANTHONY *vs.* LOUISVILLE & NASHVILLE R. R. CO.

Now comes the plaintiff, John B. Anthony, by his attorneys, Nathan Frank and Dyer, Lee & Ellis, and moves the court to set aside the verdict in this cause and to award plaintiff a new trial for the reasons—

1. The verdict of the jury is against the evidence pre-
190 sented at the trial.

2. The verdict is against the weight of evidence.

3. The verdict is against the law as declared in the charge of the court.

4. Because the court erred in refusing to charge the jury as requested by the plaintiff.

NATHAN FRANK,
DYER, LEE & ELLIS,
Pl'tff's Att'ys.

Which said motion the court, on the — day of April, 1886, overruled; to which ruling and order of the court the plaintiff then and there excepted at the time.

He therefore prays the court to allow and sign this bill of exceptions, and that the same may be signed and sealed and made part of the record at the same term of the court in which all the aforesaid proceedings were had; which is done this 17th day of May, 1886.

(Signed) SAMUEL TREAT, *Judge.* [SEAL.]

And afterwards, to wit, on the 4th day of June, A. D. 1886, the following further proceedings were had and appear of record in said cause, to wit:

Appeal Allowed.

JOHN B. ANTHONY, Plaintiff,
vs. } 2547.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Defendant.

Now comes the plaintiff, by attorney, and presents to the court a writ of error to remove this cause to the Supreme Court of
191 the United States, and a citation citing and admonishing the said defendant to be and appear at a Supreme Court of the United States on the first day of the next term thereof, to be begun and holden at Washington, D. C., on the second Monday of October next; which said writ of error is allowed and said citation signed by the judge.

And said plaintiff also presents to the court his bond in the penal sum of five hundred dollars; which bond is approved and ordered to be filed as part of the record herein.

Said bond is in words and figures following to wit:

192 UNITED STATES OF AMERICA, } *ss:*
Eastern District of Missouri,

F. M. Weaver, obligor in the within bond, being duly sworn, on his oath deposes and says that he is worth, over and above all his debts and liabilities, the sum of two thousand dollars, and that he

owns real & personal property to that amount, subject to execution, within the State of Missouri.

F. M. WEAVER,
1008 *Olive St., St. Louis, Mo.*

Subscribed and sworn to by said F. M. Weaver, the above-named affiant, this 3d day of June, A. D. 1886, before me, at office, in the city of St. Louis.

A. P. SELBY,
Clerk U. S. Cir. Court, E. Dist. Mo.

193 Know all men by these presents that we, John B. Anthony and F. M. Weaver, are held and firmly bound unto the Louisville and Nashville Railroad Company in the full and just sum of five hundred dollars, to be paid to the said Louisville and Nashville Railroad Company, their successors or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of June, in the year of our Lord one thousand eight hundred and eighty-six.

Whereas lately, at the March term of the circuit court of the United States for the eastern district of Missouri, in a suit depending in said court between John B. Anthony, plaintiff, and Louisville and Nashville Railroad Company, defendant, judgment was rendered against the said John B. Anthony, and the said John B. Anthony having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation, directed to the said Louisville and Nashville Railroad Company, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said John B. Anthony shall prosecute said writ to effect and answer all damages and costs if he fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

JOHN B. ANTHONY, [SEAL.]
By NATHAN FRANK, [SEAL.]
Att'y-in-Fact.
F. M. WEAVER. [SEAL.]

Approved by—
SAMUEL TREAT, *Judge.*

194 [Endorsed:] No. 2547. United States circuit court, eastern district of Missouri. John B. Anthony *vs.* Louisville & Nashville R. R. Co. Bond, $500. John B. Anthony, principal; F. M. Weaver, surety. Filed 4th day of June, 1886. A. P. Selby, clerk.

195 UNITED STATES OF AMERICA, } ss:
Eastern District of Missouri, }

I, A. P. Selby, clerk of the circuit court of the United States in

and for the eastern district of Missouri, do hereby certify the writing hereto attached to be a true transcript of the record and proceedings in case No. 2547, of John B. Anthony, plaintiff, against Louisville & Nashville Railroad Company, defendant, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, in said district, this fourth day of August, in the year of our Lord eighteen hundred and eighty-six.

(Seal of the United States Circuit Court.)
(Eastern District of Missouri.)

A. P. SELBY,
Clerk of said Court.

196 [Endorsed:] No. 2547. United States circuit court, eastern district of Missouri. John B. Anthony against Louisville and Nashville R. R. Company. Duly certified transcript of the record in the above-entitled cause.

Endorsed on cover: E. Missouri C. C. U. S. No. 344. John B. Anthony, plaintiff in error, *vs.* The Louisville & Nashville Railroad Company. Filed September 16, 1886.

FILED,
OCT 18 1889
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 77.

JOHN B. ANTHONY, PLAINTIFF IN ERROR,

vs.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

STATEMENT, BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

NATHAN FRANK,
AND D. P. DYER,
ATTORNEYS FOR PLAINTIFF IN ERROR.

Nixon-Jones Printing Co., St. Louis.

Supreme Court of the United States.

OCTOBER TERM, 1889.

JOHN B. ANTHONY, *Plaintiff in Error,*
vs.
THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY. } *No. 77.*

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

PLEADINGS.

PETITION.

UNITED STATES OF AMERICA, } *ss.*
EASTERN DISTRICT OF MISSOURI. }

IN THE CIRCUIT COURT OF THE UNITED STATES, EASTERN DISTRICT OF MISSOURI.

SEPTEMBER TERM, 1885.

JOHN B. ANTHONY,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Plaintiff states that he is a citizen of the State of Rhode Island.

That the defendant is a corporation and citizen of the State of Kentucky and having its principal place of business therein.

Plaintiff, for his cause of action against the defendant, states that at the time hereinafter mentioned the defendant was a corporation duly incorporated under the laws of the State of Kentucky, was the owner of a certain railroad known as the Louisville & Nashville Railroad, together with the tracks, cars, locomotives, and other appurtenances thereto belonging, and was a common carrier of passengers thereupon for hire between the places hereinafter mentioned.

That on the 23d day of October, 1883, he was a passenger on the defendant's line of railroad for the purpose of being conveyed thereon to the City of St. Louis, State of Missouri; that he was going from Louisville, Kentucky, to said City of St. Louis, and paid said defendant for such service in conveying him to said city on its said line of railroad the usual and customary charge.

That while he was such passenger, on the 23d day of October, 1883, the track used by the defendant's road about three and a half miles east of East St. Louis, Illinois, was defective and unsound and unfit to be used for that purpose, which the defendant might and would then and theretofore have known by due care, but not regarding its duty it negligently suffered it to be used, and while the car used by the defendant to convey the plaintiff was proceeding with said plaintiff therein on said defective and unsound track it was, by reason of said defect and unsoundness and the negligence of the defendant and its servants, thrown from the track and the plaintiff was bruised and wounded and otherwise injured.

That by reason thereof the plaintiff became and was for a long time ill; was obliged to and actually did expend the sum of eight hundred (800) dollars in medical and other treatment and attendance in attempting to cure and caring for himself; that he was unable to attend to his business, and may be unable to actively pursue his business hereafter, to his damage in the sum of twenty thousand dollars, for which sum he demands judgment and for his costs.

NATHAN FRANK,
Attorney for Plaintiff.

ANSWER.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

J. B. ANTHONY, *Plaintiff*,

vs.

LOUISVILLE AND NASHVILLE R. R. CO., *Defendant*.

The defendant comes, by attorney, and, for answer to plaintiff's petition in the above-styled cause, denies each and every allegation or statement in said petition contained.

For a further defense and answer to said petition defendant says that on or about the 23d day of October, 1883, about three and one-half miles from the City of East St. Louis, State of Illinois, a train of cars, hauled by its locomotive over its road-bed were thrown therefrom by reason solely of a latent or hidden defect or flaw in the interior or body of a steel rail laid in the track of said road-bed.

That no outward inspection or observation could discover or detect said defect or flaw for the reason that said steel rail on its surface was apparently perfect and without defect and in all respects adapted to the uses to which it was put.

That said steel rail containing said flaw or defect by reason thereof was fractured while said locomotive and train of cars was passing over said rail, and thereby the sleeping car, being the last coach in said train, and one passenger coach immediately in front of it, were thrown from the track. All the other portion of said train, consisting of the locomotive, tender, the baggage cars, three passenger coaches, and one sleeping coach, passed over said rail in safety and were not thrown from the track.

HENRY W. BOND,
Attorney for Defendant.

REPLICATION.

JOHN B. ANTHONY, *Plaintiff*,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, *Defendant.*

Now comes plaintiff and, for reply to the new matter set up in defendant's answer, denies each and every allegation thereof and asks for judgment for twenty thousand dollars and costs, as prayed for in his petition.

NATHAN FRANK,
Attorney for Plaintiff.

STATEMENT OF CASE.

The Louisville and Nashville Railroad Co., a railroad corporation of the State of Kentucky and a common carrier for hire, on the 23d day of October, 1883, while conveying John B. Anthony, the plaintiff, as a passenger on its line of railroad from Louisville, Kentucky, to the City of St. Louis, caused him to be injured by reason of a derailment of its coach in which he was riding so that he was under a large expense, seven hundred and fifty ($750) dollars in medical treatment and was unable to pursue his business and otherwise severely damaged.

The issue is made by the pleadings and the admission in the record made by the counsel. And is thus briefly stated by the court and counsel at the out-set of the trial, page 8 of the record.

"The Court: It is not denied that the gentleman left there during that month and met with an accident; the only question is as to whether there was any negligence on the part of the company.

Counsel for Plaintiff: And the extent of the injury.

Counsel for Defendant: Yes, sir; it is admitted that the plaintiff was injured while a passenger on defendant's road, and the question is as stated by the court."

All the testimony tends to prove the same state of facts, namely: That the accident resulted from the use of a defective and unsound track and the testimony of the defense being affirmatively that the car was thrown from the road-bed "by reason *solely* of a latent or hidden defect or flaw in the interior or body of a steel rail laid in the track on said road-bed."

It appears that after the accident the rail which caused the car to be thrown from the track, was found broken in from five to eight pieces varying from six to eight inches in length.

That these pieces were in possession of the company, but were not produced at the trial, so that there was no opportunity on the part of the plaintiff to make an examination of the rail or the pieces of the rail which the defense set up, whose breakage was caused by a latent defect or flaw.

Indirect testimony was produced showing that this particular rail broke because of a defect which was not apparent by examination or tests properly applied by mechanical supervision of the road.

No legal testimony was produced showing that this rail had a latent defect or that the rail had been examined by the agent and servants before the accident with a view of testing its soundness.

At the trial plaintiff took exceptions to evidence introduced by the defendant and to the charge given to the jury by the court and the refusal of the court to charge the jury as requested by plaintiff.

The court charged the jury as follows:—

"Gentlemen of the jury: The principles of law governing cases of this character are very few and very simple. A passenger on a railroad train has a right to suppose that all the appliances connected with his transportation are such

as the highest degree of human skill and prudence would furnish. If he meets with an injury through the fault of the railroad company he is entitled to compensation therefor, including all the expenditures by him made in consequence of said injury, together with his loss of time and a proper allowance for any special suffering to which he may have been put, mentally or physically; and, also, the jury will take into consideration whether the injury is permanent or temporary.

Now, in this case it seems — and it is for you to determine, gentlemen, in the light of the testimony — that the injury was caused by a defective rail while this train on which the plaintiff was a passenger was running at such rates of speed as has been presented to you when this rail was hit.

It is the duty of a railroad company to exercise the highest degree of prudence and skill, to determine that everything is safe for transportation. If an accident happens in consequence of a failure to exercise that degree of skill and prudence the company is responsible for what may happen.

On the other hand, a railroad company, like an individua can do nothing more than to exercise all the skill and diligence known for the purposes of its employment, and having done so, if there is a latent defect, a concealed defect, which that degree of intelligence, prudence, or skill cannot detect, it is not responsible for what may happen. In other words, a railroad company is not an insurer, and, while it is not an insurer that the passengers shall be transported with perfect safety, it is bound, on the other hand, to exercise all of the skill and prudence known to the highest order of intelligence connected with such matters.

If this is done and an accident occurs it has discharged its duty. It is unfortunate that some one should suffer, but, the measure of duty having been discharged, as thus stated, by the railroad company, the loss must fall where it unfortunately has fallen.

Consequently, this case has seemed to the court all the way through to turn on one question mainly, viz., the character of the rail. Was it a rail not fit to be used, and could the company have known it, for the purpose for which it was used? If it could, the company was liable for the injury that was caused by the use of such an improper rail.

Second, if it were originally fit for the purposes used, and through some cause or other it had become defective and the company could have detected that defect and the injury was caused, still the company is liable.

I put a great many questions — because it did not seem to my mind, though I am not to determine that and the jury are to determine it — as to what was the character of the rail itself and what were its connections with the adjoining rails.

Ordinarily, as stated by the witnesses here, under our modern contrivances for safety, rails on a track are not only fastened by what are known as chairs and ties, but also by fish-plates. I endeavored to ascertain, if possible, the condition of these fish-plates, so that after the accident it might be determined whether there were fish-plates at either end of this short rail. It is for you to say with regard to that. It does not become the court to comment on the testimony. It must suffice for the purposes of this case, so far as the court is concerned, that this accident happened. You have heard the testimony as to how it happpened. You have heard the effect upon this rail, broken into sections of several pieces, and if that rail was fit for the work and the exercise of the highest degree of care and attention on the part of this railroad would not have enabled it to detect that it was unfit, as it turned out to be, then the company is not liable. If it was unfit and they knew it, or by extreme care and skill could have found that it was unfit when the injury occurred, then the company is liable.

So practically the question is, Was this a latent defect which could not be detected by the company? If it was,

the company is not liable. If it were otherwise, then the company is liable."

The plaintiff requested and prayed the court to charge and instruct the jury as follows: —

"1. The plaintiff asks the court to charge the jury that the throwing of the coach from the track or the breaking of the rail is of itself sufficient to raise a presumption of negligence against the defendant. Public policy requires of the carrier in such cases that it shall affirmatively show that it had taken all usual and practical precautions, as applied to the careful and capable management of passenger railways, to maintain its track, roadway, and appliances for carrying in a safe condition. While its obligation does not rise to the degree of warranting the safety of its track and roadway, the law nevertheless exacts that when an injury occurs to a passenger by an occurrence so unusual and so perilous to human life it shall make it appear that the utmost practical care and diligence had been observed, and that no degree of care usually and practically applicable to the careful management of like railways would have discovered the defect which probably caused the accident and thus prevented its occurrence, and it is incumbent on the railroad company to establish by evidence, to the satisfaction of the jury in explanation of the cause of the accident, that it had employed the utmost skill, prudence, and circumspection in its business as a common carrier, and notwithstanding all that, the cause of the accident was not and could not have been discovered and guarded against.

2. The court is asked to charge the jury that a carrier is bound to exercise the strictest vigilance and the utmost degree of care, diligence, and precaution in conveying passengers to their respective destinations, and this means that he will transport in safety so far as human care and foresight can go.

3. The plaintiff asks the court to charge the jury that, in addition to the actual outlays and expenses of plaintiff which the injury necessitated, the jury, in assessing the

plaintiff's damages, may also consider the pain which he has suffered, physical and mental, the value of his time that he lost or which was likely to be lost by reason of the injury, whether such injury was likely to be permanent or not, and, upon consideration of all the facts proved, ascertain the extent of the injury and award such damages, as in their judgment, will compensate, so far as money can, for such injury."

The court declined to give either one of these instructions, and the refusals to charge as requested were excepted to as well as the charge given, and form the basis of the bringing of the case to this court.

The jury returned a verdict for the defendant. The plaintiff moved for a new trial, for the reasons set out in the motion, page 127. The motion was denied, and the case is here by writ of error.

ASSIGNMENT OF ERRORS.

1. The court erred in giving the charge in this case — which was in the aggregate and as a whole in its own language.

2. The court erred in not giving instruction No. 1, prayed for by the plaintiff, which set out the presumption of negligence against the defendant by the throwing of the coach from the track by the breaking of the rail, and that the carrier must show affirmatively that it was not liable.

3. The court erred in refusing to charge the jury as prayed for in instruction No. 2, of plaintiff, that the degree of care incumbent on a carrier of passengers was "so far as human care and foresight can go."

BRIEF AND ARGUMENT.

I.

The law as declared by the Court in the charge to the jury was incorrect. The duty of railroad carriers of passengers is a higher one than that stated by the Court in the charge.

a. This language of the Court is very objectionable: "A railroad company, *like an individual*, can do nothing more than to exercise all the skill and diligence known for the purposes of its employment, and having done so, if there is a latent defect, a concealed defect, which that degree of intelligence, prudence or skill cannot detect, it is not responsible for what may happen."

It is in the first place objectionable because a railroad company's duty is not like that of an individual. The employment and its obligation has no similitude with that of the employment or any obligation of an individual. Louisville Ry. Co. *v.* Snider (1889), 20 N. E. Rep. 284–286.

It is objectionable in the second place because it leaves the jury to infer that *having done so* — that is, the company had exercised all skill and diligence in this case, there having been a latent defect or concealed defect it was not responsible.

This particular view of the matter, misleading as we contend, is emphasized in the next sentence of the Court, to wit: "In other words, a railroad company is not an insurer, and, while it is not an insurer that the passengers shall be transported with perfect safety, it is bound, on the other hand, to exercise all of the skill and prudence known to the highest order of intelligence connected with such matters."

b. The charge of the Court to the jury with respect to the rails on a track being fastened by fish plates, was entirely out of the case, and was prejudicial to the plaintiff. We refer to this language: "Ordinarily, as stated by the witnesses here, under our modern contrivances for safety, rails on a track are not only fastened by what are known as chairs and ties, but also by fish plates. I endeavored to ascertain if possible the condition of these fish plates, so that after the accident it might be determined whether there were fish plates on either end of this short rail."

There was no allegation that there was any absence of chairs and ties or fish plates in plaintiff's petition, and no matter what the allegations of the petition were or might have been, the defense was an affirmative defense set up in the answer "that the injury was caused by reason solely of a latent or hidden defect or flaw in the interior or body of the steel rail," and it was upon this question and issue that the case was tried.

The duty imposed on carriers is a higher one than that declared by the Court, taking the Court's charge as a whole and it was given.

The numerous authorities cited by Judge Thompson in his recent work on "Trials" sustain this view.

2 Thompson on Trials, §1690 *et seq.*, § 1774 *et seq.*;
Indianapolis & St. Louis R.R. Co. *v.* Horst, 93 U. S. 291;
Railroad Co. *v.* Pollard, 22 Wall. 341;
Penn. Ry. Co. *v.* Roy, 102 U. S. 451–456;
Kellow *v.* Cent. Iowa R.R. Co., 21 Am. & Eng. R.R. Cases, 485;
R. R. Co. *v.* Lockwood, 17 Wall. 374; 383;
The "City of Panama," 101 U. S. 462.

II.

In cases of injuries resulting from accidents on railroad trains received because of a car leaving the track, *a pre-*

sumption of negligence arises against the Company which can be overcome only by proving that it had used the utmost skill and care and that the cause of the accident could not have been foreseen or the accident prevented.

This is the law in these States where the question has fairly been presented.

Wilson *v.* Northern Pac. Ry. Co., 3 N. W. Rep. 333; *s. c.* —
Cleveland, C. C. & I. Ry. Co. *v.* Newell, 3 N. E. Rep. 836; 104 Indiana, 264;
Louisville, N. A. & C. Ry. Co. *v.* Pedigo, 8 N. E. Rep. 627; 108 Ind. 481;
Louisville, N. A. & C. Ry. Co. *v.* Thompson, 8 N. E. Rep. 18;
s. c. 9 N. E. Rep. 357;
s. c. 107 Ind. 442;
Moore *v.* Des Moines & F. D. Ry. Co., 30 N. W. Rep. 51 (Iowa);
Lawrence *v.* Green, 11 Pac. Rep. 750 (Cal.);

This subject is fully gone over in the case of Louisville, N. C. Ry. Co. *v.* Jones, 9 N. E. Rep. 476, *s. c.* 108 Ind. 551.

Louisville and Nashville R. R. Co. *v.* Ritter, 3 S. W. Rep. 591, (Ky.);
Meier *v.* Railroad Co., 64 Pa. St. 226, 230;
Jamison *v.* San Jose R. R.Co., 55 Cal. 597;
N. O. & G. N. R. R. Co., 38 Miss. 274;
B. & O. Ry. Co. *v.* Worthington, 21 Md. 284;
Condy *v.* St. L., I. M. & S. Ry. Co., 85 Mo. 85;
Waller *v.* Hann. & St. Joe Ry. Co., 83 Mo. 616;
Seyboldt *v.* Ry. Co., 95 N. Y. 562;
R. R. Co. *v.* Maphey, 90 Pa. St. 135;
Gulf, C. & S. F. Ry. Co. *v.* Smith (1889, Tex.) 11 S. W. Rep. 1104.

See subject — covered in Thompson Carriers of Pass., p. 211.

We submit that this declaration of the law has the sanction of this court; in Christie v. Griggs, 2 Camp. 69, Chief Justice Mansfield said: "I think the plaintiff has made a *prima facie* case, by proving his going in the coach, and the extent and the damage he has suffered. When the breaking down or overturning of the coach is proved, negligence on the part of the owner is implied."

This case is cited with approbation by this court in Stoker *v.* Saltonstall, 13 Pet. 181. In Railroad Co. *v.* Pollard, 22 Wall. 341, the case of Stoker *v.* Saltonstall was approved, and it was declared that in a suit against a railroad company for an injury to a passenger, if it appears the passenger was in exercise of that degree of care which might be reasonably expected from a person in his situation, and injuries occurred to him, this is *prima facie* evidence of the carrier's liability.

In the case of Transportation Co. *v.* Downer, 11 Wall. 129, the court cites, on p. 135, and with approval, the language of the Court of Appeals of New York as follows:—

"As railroad companies are bound to keep their roads, carriages and all apparatus employed in working them free from any defect which the utmost knowledge, skill and vigilance, could discover or prevent, if it appears that an accident was caused by any deficiency in the road itself, the cars, or any portion of the apparatus belonging to the company and used in connection with its business, a presumption of negligence on the part of those whose duty it was to see that everything was in order *immediately arises*, it being extremely unlikely that any defect should exist of so hidden a nature that *no* degree of skill or care *could have seen or discovered it*."

In the case of Rose *v.* The Stephen & Conduit Transp. Co., 11 Fed. Rep. 438, the exact question arose. The error complained of was that the jury had been instructed that they might infer negligence from the fact of the ex-

plosion of the boiler. The court says: "That it is indulged as a legitimate inference whenever the case is such as in the ordinary course of things does not take place when proper care is exercised and is one for which the defendant is responsible."

This court sustains therefore the position, we take of the defendant's duty.

This would be the law of the case irrespective of the defendant's pleadings, but the defendant sets up affirmatively that an accident has occurred and seeks to avoid liability by accounting for the accident by alleging that it was caused by some latent or hidden defect; *it was therefore incumbent upon the defendant to have shown by direct proof that this latent defect was one which the closest examination could not discover and was the cause of the disaster.* The burden was on the defendant to overcome the inference of negligence.

This was not done. There was no direct proof whatever that there was any defect in this rail, to which the derailment could be attributed, but the defendant seeks to obtain an inference from the testimony, which was indirect, that steel rails of the best manufacture contain sometimes a latent defect which caused the breaking of rails, and that this may have been the cause of this disaster.

Having narrowed the case to the one issue, the defendant, in order to rebut the presumption, should have produced the rail, from which an examination could have been made by observation of the jury, which would be manifest to the commonest understanding, being without the need of expert testimony, by locating the air cell or vacuum which it is asserted this rail *must* have had, not *did* have.

The request of the court made by the plaintiff to charge the jury as set forth in the first instruction asked, was proper, and the refusal is manifestly error.

The burden of rebutting the presumption of negligence or the *prima facie* case made out by the plaintiff and admitted by the railroad company was upon the defendant to

rebut and to destroy that presumption, and plaintiff so asked the court to charge.

When a passenger is injured by an accident, it is *res ipsa louquitur* — the thing speaks for itself — the defendant must prove that it is not the result of his negligence and that it could not have been avoided. Unless the defendant proves itself free from negligence, it is liable according to the authorities cited in this brief. It is apparent that there was little legal evidence offered as to the condition of the rail. None of the railroad employes examined the rail after the injury, but it seems it was boxed up and taken to Mount Vernon, Illinois, and never produced. This rail was the best obtainable evidence; it was the best evidence the case was susceptible of; it should have been produced; in the absence of process compelling its production, plaintiff had a right to rely and was actually led to believe that the rail would be produced, and the presumption of this non-production should have been drawn strongly against the company.

Even if we concede the charge as given to the jury by the court to be correct as far as it went, it did not go to the extent demanded by the law. The degree of care to be observed must be commensurate with the character of the agencies employed.

The company is not exonorated from liability for injuries resulting from defects in its vehicles because it purchased them from competent manufacturers, but is responsible for defects therein resulting from the negligence of the manufacturer precisely the same as it would be if it manufactured them itself.

Louisville Ry. Co. *v.* Snyder (1889) 20 N. E. Rep. 284–286 and cases cited, C. J. Elliott, of Indiana; Burns *v.* Cork, etc., *v.* Railroad Co., 13 I. R. C. L. 543.

We do not contend that it is responsible for all defects therein, but only for such as can be ascertained by the exer-

cise of the highest degree of vigilance; or in other words: for defects that could not be detected with any degree of care or skill either in the course of manufacture or afterwards.

We do not contend for the rule laid down by the Court of Appeals of New York in Alden *v.* N. Y. Cent. Ry. Co., 26 N. Y. 102, in Illinois in the case of Pittsburg R. R. *v.* Thompson, 56 Ill. 138, 68 Ill. 597, and in Hageman *v.* Western Ry. Co., 13 N. Y. 9, where the plaintiff was injured by the breaking of an axle from a latent defect *which could not have been discovered by the most vigilant examination*, and the company was held chargeable, for this would in effect make the company an insurer of the absolute safety of passengers, which it is of goods it undertakes to carry, which distinction we think it is well to maintain.

In the English courts the question never reached a satisfactory determination until the case of

Readhead *v.* The Midland Ry. Co.; L. R. 2 Q. B. 412; L. R. 4 Q. B. 379,

where the accident occurred by the giving way of one of the wheels of the car, owing to a defect in the welding of the tire caused by an air bubble.

The case was taken to the Court of Queen's Bench and on error to the Court of Exchequer Chamber, where the case was carefully considered, and the conclusion there reached may be stated to be this: —

Where the accident arises from a hidden or latent defect which a careful and thorough examination would not disclose and which could not be guarded against by the exercise of the soundest judgment and the most vigilant foresight, and which no human care or skill could have either detected or prevented, the company is not liable; where it discloses by testimony that every known and practicable test for the discovery of defects had been employed, and it appears that such defect actually existed, but was undis-

coverable by such test, he will not be held liable to the passenger for an injury which may result from it.

III.

Instruction No. 2 of plaintiff should have been given.

This court has repeatedly said, that when carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and vigilance — that is so far as human care and foresight can go.

This is a statement of the doctrine applying to the duty or contract of a carrier of passengers, and this court ought not to lose sight of the distinction between the case at bar, as the court below did, and the ordinary case of an injury to a passenger not growing out of a defect in a vehicle, rolling stock, road-bed or other appliances of the carrier.

This is alluded to because we believe that irrespective of the principles applicable to the one character of cases, such as the case at bar, and the principles applicable to the general run of cases, involving simply what might be termed active negligence; that is to say, where the negligence grows out of some living, active force and passive negligence, which grows out of the inanimate power of harm, like a broken rail, a defective tire or axle, or a frail bridge.

We contend that the charge of the court did not come up to the standard which measures cases of the second kind here referred to.

Phil. & Reading Ry. Co. *v.* Derby, 14 How. 486;
Steamboat New World *v.* King, 16 How. 469;
N. Y. Cent. Ry. Co. *v.* Lock, 14 Wall. 357;
Indianapolis Railroad *v.* Horst, 93 U. S. 291;
Robinson *v.* N. Y. Cent. R. R., 9 Fed. Rep. 877;
Rintoul *v.* N. Y. Cent. R. R., 13 Fed. Rep. 905–907.

Can it be said in view of these authorities that the defendant on the record has showed that he employed the highest degree of care which the law imposes upon him, or that the court in its charge declared the law consistent with these views.

The fact relied on, this disaster was caused by a latent defect which caused the rail to be broken by the passing of the cars over it, if true is susceptible of the clearest proof. The rail and its pieces, according to the testimony, was in possession of the defendant company; it was asked to produce the rail; it had the rail and the pieces at its shops at Mount Vernon, Illinois, only a few miles from St. Louis (see printed transcript of record, page 53), and did not produce the rail.

There is no process which could be awarded compelling the defendant to produce the rail in court or for an inspection or examination out of court.

The experience of every lawyer is that it is usual for a defendant to avail himself of the proof in his possession substantiating his defense by a production of the proof.

Where a defendant does not produce the best evidence which he might have produced to overcome a presumption or to prove a given state of facts, essential to his defense, a presumption arises against him which in many cases known to the practitioner such as the destruction or suppression or failure to make *profert in curia* is quite conclusive. It will be observed in this case that the only testimony touching the condition of the rail with respect to alleged latent defect was that the steel rails furnished to the Louisville & Nashville Railway Co. were manufactured at the Joliet Steel Works, and in the opinion of the Superintendent of the railroad, C. O. Parker (page 46 of the record), "it looks like as though there had been a bubble of air inside during the casting."

Neither the track man or the section man of the section from which this rail was removed after being broken, ever examined the rail after the injury. (See testimony of Wm.

Mitchell, page 93 of the record.) Q. Did you ever look at the rail afterwards? A. No, sir. I never did.

(Page 94 of the record): Q. How many pieces was that rail broken into? A. I could not tell you?

Q. Did you examine it to see? A. No, sir.

Q. Who took the broken pieces from the track? A. I could not tell you that.

Q. Did you examine the rail when it was broken? A. No, sir.

Q. Have you ever seen it since? A. No, sir.

Patrick Meyer, foreman of the road, page 105, printed transcript of record.) Q. Do you recollect whether you examined the rail particularly after it was broken; did you examine the rail? A. No, sir. I didn't examine it.

On the contrary, the undisputed testimony of the road-master, T. B. Robinson (pages 113, 114 and 115), was to the effect that this rail, and it was the *only short rail* in the track, being 15 feet long, had been in use in East St. Louis *for two (2) years*, and was taken up and placed upon *the track at Rankin switch*, where the accident occurred.

In conclusion, we beg to submit that if the court will carefully analyze the charge given in this case, they will see that the same charge would have been applicable to the case in the suit brought by one person against another for an injury caused by the servant of the other, particularly when the concluding paragraph of the court's charge to the jury is considered; that paragraph leaves out of view the high obligation on the part of a carrier that as far as *human care and foresight can go he* will transport passengers in safety, and really places the liability of the company upon the knowledge of the defective track or a defect which could not be known by the company, instead of laying down the law that the company could not relieve itself from this high obligation except by showing that the defect was one that could not have been discerned or reme-

died by the exercise of foresight and care, and such foresight and care had been exercised.

The case is a very disastrous one to the plaintiff. Not only is he injured but suffers greatly a thousand miles away from home and is obliged to be treated at great expense, but when his case is called for trial, he is unfairly treated by the railroad company, from whom he expected not only as a passenger, but from the well known duty which a carrier owes to the public, the fairest treatment and evidence which would exonerate them, if possible, under the well known rules of law, such as the production of the best evidence of the cause of the injury, but he is also placed at a serious disadvantage before the jury in the entire omission to charge them as to where the burden of exoneration is, as well as a charge instructing the jury respecting the stringent obligations due from a carrier to a passenger.

We respectfully submit that there should be a reversal of the case.

NATHAN FRANK,
D. P. DYER,
Attorneys for Plaintiff in Error.

[redacted]

[redacted]

vs.

JOHN B. ANTHONY, [redacted]

[redacted]

THE LOUISVILLE AND [redacted]
ROAD COMPANY, [redacted]

[redacted]

IN ERROR TO THE CIRCUIT COURT OF [redacted]
FOR THE [redacted]

[redacted]

STATEMENT, POINTS AND ARGUMENT OF DEFENDANT IN ERROR.

[redacted]

[redacted]
Attorneys for Defendant in Error.

[redacted]

ST. LOUIS:
[redacted]

Supreme Court of the United States.

OCTOBER TERM, 1889.

JOHN B. ANTHONY,
Plaintiff in Error,

vs.

THE LOUISVILLE AND NASHVILLE RAILROAD CO.,
Defendant in Error.

No. 77.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

PLEADINGS.

PETITION.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF MISSOURI, } *ss.*

IN THE CIRCUIT COURT OF THE UNITED STATES,
EASTERN DISTRICT OF MISSOURI.

SEPTEMBER TERM, 1885.

JOHN B. ANTHONY,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Plaintiff states that he is a citizen of the State of Rhode Island.

That the defendant is a corporation and citizen of the State of Kentucky and having its principal place of business therein.

Plaintiff, for his cause of action against the defendant, states that at the time hereinafter mentioned the defendant was a corporation duly incorporated under the laws of the State of Kentucky, was the owner of a certain railroad known as the Louisville & Nashville Railroad, together with the tracks, cars, locomotives, and other appurtenances thereto belonging, and was a common carrier of passengers thereupon for hire between the places hereinafter mentioned.

That on the 23d day of October, 1883, he was a passenger on the defendant's line of railroad for the purpose of being conveyed thereon to the City of St. Louis, State of Missouri; that he was going from Louisville, Kentucky, to said City of St. Louis, and paid said defendant for such service in conveying him to said city on its said line of railroad the usual and customary charge.

That while he was such passenger, on the 23d pay of October, 1883, the track used by the defendant's road about three and a half miles east of East

St. Louis, Illinois, was defective and unsound and unfit to be used for that purpose, which the defendant might and would then and therefore have known by due care, but not regarding its duty it negligently suffered it to be used, and while the car used by the defendant to convey the plaintiff was proceeding with said plaintiff therein on said defective and unsound track it was, by reason of said defect and unsoundness and the negligence of the defendant and its servants, thrown from the track and the plaintiff was bruised and wounded and otherwise injured:

That by reason thereof the plaintiff became and was for a long time ill; was obliged to and actually did expend the sum of eight hundred ($800) dollars in medical and other treatment and attendance in attempting to cure and caring for himself; that he was unable to attend to his business, and may be unable to actively pursue his business hereafter, to his damage in the sum of twenty thousand dollars, for which sum he demands judgment and for his costs.

NATHAN FRANK,
Attorney for Plaintiff.

ANSWER.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

J. B. ANTHONY, *Plaintiff,*

vs.

LOUISVILLE AND NASHVILLE R. R. Co., *Defendant.*

The defendant comes, by attorney, and, for answer to plaintiff's petition in the above-styled cause, denies each and every allegation or statement in said petition contained.

For a further defense and answer to said petition defendant says that on or about the 23d day of October, 1883, about three and one-half miles from the City of East St. Louis, State of Illinois, a train of cars, hauled by its locomotive over its road-bed were thrown therefrom by reason solely of a latent or hidden defect or flaw in the interior or body of a steel rail laid in the track of said road-bed.

That no outward inspection or observation could discover said defect or flaw for the reason that said steel rail on its surface was apparently perfect and without defect and in all respects adapted to the uses to which it was put.

That said steel rail containing said flaw or defect by reason thereof was fractured while said locomotive and train of cars was passing over said rail, and thereby the sleeping car, being the last coach in said train, and one passenger coach immediately in front of it, were thrown from the track. All the other portion of said train, consisting of the locomotive, tender, the baggage cars, three passenger coaches, and one sleeping coach, passed over said rail in safety, and were not thrown from the track.

HENRY W. BOND,
Attorney for Defendant.

REPLICATION,

JOHN B. ANTHONY, *Plaintiff*,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, *Defendant.*

Now comes plaintiff, and for reply to the new matter set up in defendant's answer, denies each and every allegation thereof and asks for judgment for twenty thousand dollars and costs, as prayed for in his petition.

NATHAN FRANK,
Attorney for Plaintiff.

STATEMENT OF CASE.

The testimony adduced in this case disclosed the fact that the plaintiff suffered some injuries by reason of the overturning of a sleeping car, attached to a train belonging to the defendant while this train was passing over the road-bed of the Louisville & Nashville Railroad Company, on the 23d day of October, 1883, at a point about three and one-half miles from the City of St. Louis, Missouri.

The testimony disclosed that this accident occurred without any fault or negligence on the part of the defendant, or any of its servants or agents. But it occurred solely by reason of the fact that one of the steel rails placed on defendant's road-bed was found after the accident to have been affected in

its interior and body with a hidden defect or flaw, which could not be discovered by any outward inspection or observation. The whole surface of said rail was apparently perfect and without defect.

The testimony also disclosed a history of this rail, from the time it existed in the state of pig-iron through the various processes by which it was converted into steel, thence into a steel ingot, thence into a steel rail of the highest standard and best quality. The testimony also disclosed that the best and most approved tests, both mechanical and chemical, were applied to this rail at every step, and durthe whole course of its manufacture, and that the rail itself was made by the Joliet Steel Company, and that the business reputation and commercial standing of the Joliet Steel Company was of the highest order in the matter of the manufacture of steel rails. The testimony also disclosed that, despite the application of every test, either mechanical or chemical, in the construction of steel rails, it was possible, on account of the defect in the Bessemer steel process, that an air cell or gas bubble would sometimes form or exist in the heart or body of the steel rail, leaving the entire surface covered by a surrounding of perfect steel, giving no indication whatever of such interior and hidden defect therein.

The testimony disclosed that the steel rail, whose fracture caused the overturning of the sleeper, whereby plaintiff was wounded, was examined immediately before the accident, and immediately after the accident; that before the accident the rail upon the closest inspection appeared in form to be

of the best quality, grade and standard of perfect steel; that after the accident it was seen to have contained in its body the gas cell or air bubble above described, imprisoned by a surrounding of perfect steel, covering the whole of its surface.

The foregoing facts were established by a large number of witnesses, whose testimony was so full, clear and direct that the defense may be said to have almost reached the point of a demonstration.

The plaintiff's suit was brought and tried nearly three years after the accrual of his alleged cause of action. Neither the plaintiff or his attorney at any time, nor in any manner, ever suggested before or after the bringing of his suit that they desired the defendant to preserve the rail whose fracture caused the accident, or to produce it on the trial. And all of the statements in plaintiff's brief in this case, intimating or suggesting that there was any fault on the part of the defendant in not presenting the rail to the plaintiff three years after the accident for his inspection without his having asked for it in any manner, are totally unsupported facts, as shown in the record in this case.

At the conclusion of the evidence, the court charged the jury as follows:

"Gentlemen of the Jury: The principles of law governing cases of this character are very few and very simple. A passenger on a railroad train has a right to suppose that all the appliances connected with his transportation are such as the highest degree of human skill and prudence would furnish. If he meets with an injury through the fault of the railroad company he is entitled to compensation

therefor, including all the expenditures by him made in consequence of said injury, together with his loss of time and a proper allowance for any special suffering to which he may have been put, mentally or physically; and, also, the jury will take into consideration whether the injury is permanent or temporary.

Now, in this case it seems—and it is for you to determine, gentlemen, in the light of the testimony—that the injury was caused by a defective rail while this train on which the plaintiff was a passenger was running at such rates of speed as has been presented to you when this rail was hit.

It is the duty of a railroad company to exercise the highest degree of prudence and skill to determine that everything is safe for transportation. If an accident happens in consequence of a failure to exercise that degree of skill and prudence, the company is responsible for what may happen.

On the other hand, a railroad company, like an individual, can do nothing more than to exercise all the skill and diligence known for the purposes of its employment, and having done so, if there is a latent defect, a concealed defect, which that degree of intelligence, prudence, or skill cannot detect, it is not responsible for what may happen. In other words, a railroad company is not an insurer, and, while it is not an insurer that the passengers shall be transported with perfect safety, it is bound, on the other hand, to exercise all of the skill and prudence known to the highest order of intelligence connected with such matters.

If this is done, and an accident occurs, it has discharged its duty. It is unfortunate that some one should suffer, but the measure of duty having been discharged, as thus stated by the railroad company, the loss must fall where it unfortunately has fallen.

Consequently, this case has seemed to the court all the way through to turn on one question mainly, viz., the character of the rail. Was it a rail not fit to be used, and could the company have known it, for the purpose for which it was used? If it could, the company was liable for the injury that was caused by the use of such an improper rail.

Second, if it were originally fit for the purposes used, and through some cause or other it had become defective and the company could have detected that defect and the injury was caused, still the company is liable.

I put a great many questions—because it did not seem clear to my mind, though I am not to determine that and the jury are to determine it—as to what was the character of the rail itself and what were its connections with the adjoining rails.

Ordinarily, as stated by the witnesses here, under our modern contrivances for safety, rails on a track are not only fastened by what are known as chairs and ties, but also by fish-plates. I endeavored to ascertain, if possible, the condition of these fish-plates, so that after the accident it might be determined whether there were fish-plates at either end of this short rail. It is for you to say with regard to that. It does not become the court to comment on the testimony. It must suffice for the pur-

pose of this case, so far as the court is concerned, that this accident happened. You have heard the testimony as to how it happened. You have heard the effect upon this rail, broken into sections of several pieces, and if that rail was fit for the work and the exercise of the highest degree of care and attention on the part of this railroad would not have enabled it to detect that it was unfit, as it turned out to be, then the company is not liable. If it was unfit and they knew it, or by extreme care and skill could have found that it was unfit when the injury occurred, then the company is liable.

So, practically, the question is: Was this a latent defect which could not be detected by the company? If it was, the company is not liable. If it were otherwise' then the company is liable."

Thereupon, the plaintiff requested the court to charge and instruct the jury as follows:

"The plaintiff asks the court to charge the jury that the throwing of the coach from the track or the breaking of the rail is of itself sufficient to raise a presumption of negligence against the defendant. Public policy requires of the carrier in such cases that it shall affirmatively show that it had taken all usual and practical precautions, as applied to the careful and capable management of passenger railways, to maintain its track, roadway, and appliances for carrying in a safe condition. While its obligation does not rise to the degree of warranting the safety of its track and roadway, the law nevertheless exacts that when an injury occurs to a passenger by an occurrence so unusual and so perilous to human life, it shall make it appear that the utmost practical

care and dilligence had been observed, and that no degree of care usually and practically applicable to the careful management of like railways would have discovered the defect which probably caused the accident and thus prevented its occurrence, and it is incumbent on the railroad company to establish by evidence, to the satisfaction of the jury in explanation of the cause of the accident, that it had employed the utmost skill, prudence, and circumspection in its business as a common carrier, and notwithstanding all that, the cause of the accident was not and could not have been discovered and guarded against.

The court is asked to charge the jury that a carrier is bound to exercise the strictest vigilance and the utmost degree of care, diligence, and precaution in conveying passengers to their respective destinations, and this means that he will transport in safety so far as human care and foresight can go.

The plaintiff asks the court to charge the jury that, in addition to the actual outlays and expenses of plaintiff which the injury necessitated, the jury, in assessing the plaintiff's damages, may also consider the pain which he has suffered, physical and mental, the value of his time that he lost or which was likely to be lost by reason of the injury, whether such injury was likely to be permanent or not, and, upon consideration of all the facts proved, ascertain the extent of the injury and award such damages, as in their judgment, will compensate, so far as money can, for such injury."

The court having instructed the jury on the question at issue in this case with great fulness, and

according to the strictest rules governing the liability of the carriers of passengers, and having embraced in its said charge the substance of all the propositions requested by the plaintiff, which were applicable to this case, declined to charge the jury any further. Thereupon, after consideration of the evidence, and under the law as contained in the charge of the court, the jury brought in a verdict for the defendant.

DEFENDANT'S POINTS.

I.

Where instructions are asked in the aggregate, and there is anything exceptionable in either of them, the whole may be properly rejected by the court.

Worthington v. Mason, 101 U. S., p. 149.
Moulan v. Am. L. Com. 111 U. S., p. 335,
Indianapolis R. R. Co. v. Horst, 93 U. S. p. 295.
Harvey v. Tyler, 2 Wall. 328.
Rogers v. The Marshall, 1 Wall. p. 644.
Johnson v. Jones, Black, p. 209.

II.

A general exception to the charge is of no avail, where the charge embraces several distinct propositions and any one of them is correct.

Burton v. West Ferry Co., 114 U. S. p. 474.
M. N. R. Co. v. Jury, 111 U. S. pp. 584–596.
Cooper v. Schlesinger, 111 U. S. p. 149.

Lincoln v. Claflin, 7 Wall. p. 132.
See Book 25 (Lawyer's Ed.), U. S. R. p. 90.

III.

No judgment should be reversed in the Supreme Court where it is clear that the appellant is not prejudiced thereby.

Lancaster v. Collins, 115 U. S. p. 227.
Hornbuckel v. Stafford, 111 U. S. pp. 389–394.
Mining Co. v. Tyler, 100 U. S. 37–42.
Cannon v. Pratt, 99 U. S. pp. 619–623.

IV.

A carrier is not responsible for an injury occasioned to one of its passengers, by a hidden and internal defect which no skill or care could either have prevented or detected.

Ingalls v. Bills, 9 Metcalfe (Mass.), p. 1.
Reedhead v. Midland Ry. Co., L. R. 4 Q. B. 379.
Richter v. The Netherlands, 7 Fed. Rep. p. 926.
Neier v. Pennsylvania R. R. Co., 64 Pa. St., p. 211, affirmed, 95 Pa. St., p. 211.
Toledo R. Co. v. Beggs, 85 Ill. p. 80.
47 Miss. 404–15.
54 Wis. p. 257–265.

ARGUMENT FOR DEFENDANT IN ERROR.

The first objection made by the plaintiff in his brief to the charge of the court in this case is di-

rected against a detached portion of the fourth paragraph of the charge of the court. (See page 126 of the printed transcript of record in this case.) The discerpted part of said charge, of which plaintiff complains, contains the following language: "A railroad company, like an individual, can do nothing more than exercise all the skill and diligence known, for the purpose of its employment. And having done so, if there is a latent defect, a concealed defect, which that degree of intelligence, prudence, or skill cannot detect, it is not responsible for what may happen."

Plaintiff makes two objections to the foregoing language, urging as the first ground of such objections the following language: "It is in the first place objectionable, because a railroad company's duty is not like that of an individual, the employment and its obligations has no similitude with that of the employment or any obligation of the individual."

Stating, as the second ground of his objection, the following language: "It is objectionable in the second place, because it leaves the jury to infer that *having done so*, the company had exercised all skill and diligence in this case, there having been a latent defect, or a concealed defect, it was not responsible."

The first ground of plaintiff's objection is transparently untenable, so far from there being difference in the duty of a railroad company and the duty of an individual exercising the same employment of common carriage of persons and freight. Their duty and obligation under the law

are absolutely identical. The court, in the language objected to, did not detract from the strictest rules governing the liability of common carriers. It only told the jury in effect that whether such duties were to be performed by a railroad company or an individual, made no difference, that the law requred both "*to exercise all the skill and diligence known, for the purpose of its employment.*"

In the use of this language, the court stated the rule as to obligations of carriers more stringently than is warranted by the authorities, or by the conclusions of reason. Neither of these require a carrier to do more than exercise "the highest degree of practicable care," and this latter is the doctrine of the case (Louisville Ry. Co. v. Lindner, 20 N. E. Rep. 284–286), which plaintiff cites in support of his objection. Whereas, the court in the above quoted language goes beyond this in defining the duties of carriers, and requires them "*to* exercise *all* the skill and diligence *known*," and in the same paragraph of its charge (which plaintiff, however, does not quote), the court, speaking of the duty of railroad, said to the jury: "It is bound, on the other hand, to exercise all of the skill and prudence known to the highest order of intelligence connected with such matters." Again, in the paragraph of its charge just before the one to which plaintiff made the above objections, the court uses the following language: "It is the duty of a railroad company to exercise the highest degree of prudence and skill to determine that everything is safe for transportation, if an accident happens in consequence of a failure to exercise that degree of

skill and prudence, the company is responsible for what may happen."

In the course of its charge from beginning to the end, the court iterated its definitions of the degree of care and skill required of carriers, and in each instance the court held them to the greatest *possible* skill and diligence, instead of the greatest practicable skill and diligence, as is required by the uniform law on this subject.

The second objection made by the plaintiff above quoted is equally pointless, and seems upon inspection to be simply a syntactical objection. The language of the court is as follows: "And having done so, if there is a latent defect which that degree of intelligence, prudence or skill cannot detect, it is not responsible for what may happen." The form of expression above quoted has exactly the same meaning as it would have had if the court had transposed the words "*if*" and "*and.*" In the latter case the sentence would have run as follows: "If having done so, and there is a latent defect, a concealed defect, which that degree of intelligence, prudence or skill cannot detect, it is not responsible for what may happen." In both cases, the alternative requiring the exercise of the prescribed degree of intelligence, prudence or skill is stated clearly and distinctly, and beyond misconception.

Plaintiff's attorney objects to that portion of the charge of the court which referred to the use of fish-plate fastenings on the end of the short rail whose fracture caused the accident. It is difficult to see the force of this objection made on behalf of plaintiff. The language of the court in the matter referred to

was so clear and suggestive of a matter of negligence which would inure to the benefit of plaintiff in the minds of the jury, that it is impossible to understand how plaintiff could be prejudiced by such a suggestion, even if it had related to some matter of negligence which had not been alleged in his petition. The court in the language quoted told the jury in effect that such fish-plate fastenings were proper, and said, further, "I put a great many questions—because it did not seem clear to my mind, though I am not to determine that, and the jury are to determine it—as to what was the character of the rail itself, and what were its connections with the adjoining rails." Surely, plaintiff cannot be heard to complain of such a direct intimation as this, that the evidence failed to disclose whether the defendant had done its duty in the matter of securing the rails laid upon its road-bed. But not only was the language of the court in this portion of its charge directly favorable to the plaintiff, but the language itself was predicated upon the testimony of two of plaintiff's witnesses (Adam Gerdiman, printed record, page 117, and William C. Hesse, printed record, pages 122-123), each of whose testimony tended to show the absence of proper fastenings for the rail. Plaintiff is also mistaken as to the allegations of his petition. The cause of action alleged therein was "defective and unsound track." Hence, he had the right to introduce testimony tending to disclose insecurity in the fastenings of the rails as he did. And the language of the court in reference to this testimony and suggestive that it left doubts in its mind was so highly favorable to the plaintiff that it would, we

submit, have constituted reversible error as against the defendant, if the jury had not been convinced by the weight and amount of testimony, adduced by the defendant against the declaration of these two witnesses for the plaintiff and substantiating the defense made in this case.

In the second part of plaintiff's brief and argument in this case (see page 11, plaintiff's brief), the point is attempted to be made that the court erred in not charging the jury in so many words, "that a presumption of negligence arises against the railroad company because of its car leaving the track." Even if the plaintiff's position on this question were conceded to be correct in the abstract, he cannot avail himself of it in this case for the following reasons: *First*, the plaintiff proffered his requests or instructions in the *aggregate* (see printed transcript of the record, page 125). The plaintiff also interposed only a *general* exception to the charge of the court (see printed transcript of the record, page 127). It is insisted that the mistake of the plaintiff in these two respects debars him from the right to complain either of the refusal of his requests of his instructions so made, or the charge of the court so excepted to under the well settled law of the Federal judiciary.

In the case of the Indianapolis Railroad Company v. Horst, 93 U. S. Reports, page 295, the Supreme Court uses the following language: "Where instructions are asked in the aggregate, as were those of the defendant, and there is anything exceptionable in either of them, the whole may be properly rejected by the court." The doctrine of

this case had been announced in the former cases of Harvey v. Tyler, 2 Wall. 328, Rogers v. Marshall, 1 Wall. 644, and Johnson v. Jones, 1 Black, 209, and has been subsequently affirmed in the cases of Worthington v. Mason, 101 U. S. Reports, 149, and Moolan v. Am. L. Co., 111 U. S. Reports, p. 335. The manner in which the plaintiff aggregated his instructions or requests in this case, and the fact that some of the instructions or requests were rhetorical and inaccurate expressions of the law, brought them all under the ban of the rule established in the foregoing cases.

Again, the vague and general exception of plaintiff to the whole charge of the court, as appear by the above reference to the transcript of the record in this case, cannot be urged now as a ground of reversal, for the reason that not only was the charge of the court a correct exposition of the law in the distinct and several propositions which it embraced, but it was highly favorable to the plaintiff as a totality. Now, we submit the law is well settled in this court in the following language: "The general exception to the charge is of no avail where the charge embraces several distinct propositions and any one of them is correct.'. (See the following cases: Cooper v. Schleisinger, 111 U. S. Reports, p. 148; M. N. R. R. Co. v. Jury, 111 U. S. Reports, p. 564, and Lincoln v. Claflin, 7 Wall. p. 132.)

There is not, however, any merit in the exceptions made by plaintiff's attorney, even if they had been properly taken. For the reason that the court substantially charged the jury on all the points arising upon plaintiff's exceptions. In the first place

the court in the very beginning of its charge told the jury as follows: "A passenger on a railroad train has a right to suppose that all the appliances connected with his transportation are such as the highest degree of human skill and prudence would furnish." Again: "Now, in this case it seems—and it is for you to determine, gentlemen, in the light of the testimony, that the injury was caused by a defective rail while this train on which the plaintiff was passenger was running at such rates of speed as has been presented to you when this rail was hit. It is the *duty* of the railroad company to exercise the highest degree of prudence and skill to determine that everything is safe for transportation. If an accident happens in consequence of a *failure* to exercise that degree of skill and prudence, the company is responsible for what may happen." * * * "If this is done, and an accident occurs, it has discharged its duty."

It is difficult to conceive how the court could have put the duty of the company in a stronger light than is contained in the above quoted expression. Nor how the court could have more clearly told the jury that it was necessary for the company to prove a full discharge of its duty in order to absolve itself from liability for the accident alluded to in the charge of the court. In the first place the court calls the attention of the jury to the particular thing, *i. e.*, "a defective rail" which brought about the accident. The court then defined the duty of the railroad company in unexceptionable terms and declares thereafter "if this done, and an accident occurs, it has discharged its duty." Having already

told the jury that any failure on the part of the company to observe the precautions imposed upon it would involve liability, the conclusion is inevitable that the jury must be satisfied from the proof offered by the company that it had discharged its duty, or they should bring in a verdict for the plaintiff. The directions contained in the charge of the court are not capable of any other construction. The plain common sense of the language employed by the court has this import and no other. The defendants in this case undertook to show that the injury was occasioned by an indiscoverable latent defect in one of the steel rails on their road-bed. If they had failed to establish this fact in the evidence adduced, their liability was certain under the charge given by the court. For in the very last paragraph (see printed transcript of the record, page 127) the court uses this language: "So, practically, the question is, was this a latent defect that could not be detected by the company? If it was, the company is not liable; if it were otherwise, then the company is liable."

Plaintiff's attorney attempts to get a reversal of this case, because, as he claims, the defendant did not substantiate its defense, and because, as he claims, defendant should have, in order to satisfy his mind, in addition to the testimony of its witnesses, also introduced the fractured rail itself in evidence.

There is no rule of law better settled than that all questions as to the weight and force of evidence are for the triers of the fact, *i. e.*, the jury, and cannot be reviewed in appellate tribunals where there

was any evidence to support the finding which was made.

Lancaster v. Collins, 115 U. S. R., pp. 222-225.

Chicago & Northwestern R. R. Co. v. Ohle, 117 U. S. R., p. 123.

It cannot be necessary to say more on this point than that the record shows that there were sixteen witnesses (besides depositions read) who testified directly and fully in substantiation of the defense made in this case. And the effect of this testimony on the part of the defendant was so convincing upon the minds of the jury that they did not hesitate to bring in a verdict exculpating the defendant from any negligence whatever.

We further submit that there was no duty or obligation on the part of the defendant to offer the rail itself in evidence on the trial of this case, for the following reasons:

First. Because if said rail had any evidentiary property whatever, and if it had been in the possession of the defendant, and if the plaintiff desired its production on the trial, it was his imperative duty to have notified the defendant to that effect. Now, there is not a shadow of claim nor any pretense that the transcript of the record in this case shows that any such notice was ever given by the plaintiff to the defendant, or to any one of the attorneys or agents representing the defendant.

Secondly, the fractured rail would have been worthless as an instrument of evidence, even if it had been preserved up to the time of the trial, from

the fact that this case was not tried until nearly three years after the accident, so that the portions or parts of the rail which were exposed by its fracture, must have became so rusted over as to make it undistinguishable where the flaw or crack in the body of the rail before its fracture was, as compared with the portion laid bare by the splintering of the rail at the time of the accident.

In other words, all portions of the inside of the rail which were laid bare by its breaking would in three years' time become covered over with common rust or oxidation. This is apparent to any one of common information, and was doubtless well understood by plaintiff and his attorney. It could not have been the duty of the defendant, therefore, to to have preserved the broken rail for two years, upon the mere chance for plaintiff's bringing a long-delayed suit, and especially is this true when it is shown, as appears from the transcript of the record in this case, that even after plaintiff finally decided to institute his suit, he never in any manner thereafter requested the defendant or his agents and attorneys to be allowed to inspect the rail or to have the same offered in evidence on the trial.

The proof offered by the defendant was confined to the testimony of many witnesses who examined the broken rail on the spot and at the time of the accident, when it could be seen where the fresh fracture was, and where the old flaw had previously existed. No testimony could have been relevant or competent which related to a time long enough after the accident for the whole surface of the rail

exposed thereby to have become covered with common rust, as must have been the case if said broken pieces had been inspected by an expert witness or by the jury three years afterwards.

The cause of the fracture of the rail could be revealed only by the sight of the rail as it was then exposed. The other part of the plaintiff's brief (see page 17) is devoted to the discussion of the question of the extent and degree of care imposed by law in cases where passengers are conveyed by railroad companies in the prosecution of their business as common carriers. If the plaintiff had confined this portion of his brief to the doctrine of the case cited by him therein, there would be no occasion on the part of defendant to make any reply. For none of the rules cited by the plaintiff go beyond the terms of the court to the jury in the case at bar. The rule has not been laid down with more vigor and strength in any well considered case than it was by the trial judge in this case, whose instructions in our judgment transcended the measure of duty imposed by law on carriers of passengers. The leading case in this country on the subject of the exemption of carriers, for liability for injuries to the passenger caused by a latent defect, is the case of Ingalls v. Bills, 9th Metcalf Reports, page one. The masterly exposition of the law in that case has been followed by the Federal and State courts before whom the question has since been presented, and has been expressly affirmed by English bench.

See Reedhead v. Midland Railway Company, quoted in full in Thompson on Carriers of Passengers, pp. 124 to 159.

This doctrine has been affirmed.

7 Fed. Rep., p. 926.
14 Fed. Rep., p. 63.
95 Penn. St. Rep., p. 211.
54 Wis., p. 257.
42 Wis., p. 520.

The doctrine of these and other cases is extracted by Judge Thompson in his book (Carriers of Passengers, p. 189, section 3), and expressed, to-wit: "The settled law is that the carrier does not warrant the safety of his vehicles and road against all accidents and contingencies but is liable only for negligence."

We submit that this statement of the rule is a complete demonstration of the want of authority, for the fanciful notion suggested under paragraph 3, page 17, of plaintiff's brief, that there is some distinction between the case of an injury to a passenger occasioned by a defect in the vehicle, roadbed or other appliance of the carrier, and an injury occasioned to the passenger by some other negligence on the part of the carrier, in the matter of the law applicable to the alleged two classes of cases.

The duties of the carrier of passengers are measured by uniform law, and it matters not whether the question of negligence relates to the practicable operation of the railroad, or to its construction or equipment; in either case, if he is wanting in the extraordinary care and diligence prescribed by law, he is liable for any injuries caused by such failure of duty. On either hand, if the car-

rier can establish that an accident has happened, free from any fault or negligence whatever on his part, on on the part of his servants, he is not liable for such accident, whether such accident was connected with his vehicles and road-beds or with any other department of his business as a carrier of passengers.

GIBSON, BOND & GIBSON,

Attorneys for Defendant in Error.

Henry W Bond
Attorney for
Defendant in
Error —

132-174

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1086.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

SAMUEL B. THOMAS, SHERIFF AND TAX-COLLECTOR OF HINDS COUNTY; G. R. KEMP, SHERIFF AND TAX-COLLECTOR OF MADISON COUNTY; D. C. LOVE, SHERIFF AND TAX-COLLECTOR OF YAZOO COUNTY; T. J. WYATT, SHERIFF AND TAX-COLLECTOR OF HOLMES COUNTY; L. T. BASKET, SHERIFF AND TAX-COLLECTOR OF LEFLORE COUNTY, AND G. B. JONES, SHERIFF AND TAX-COLLECTOR OF GRENADA COUNTY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

FILED FEBRUARY, 2, 1889.

SUPREME COURT OF THE UNITED STATES.

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INDEX

	Original.	Print.
Caption	1	1
Transcript from chancery court	1	1
Bill	1	1
Fiat for injunction	8	9
Injunction bond	8	9
Injunction writs to defendants	10	12
Demurrers by the defendants	14	17
Agreement of counsel	15	17
Final decree	16	16
Petition for appeal	17	20
Certificate of chancery clerk	17	20
Appeal bond	18	21
Assignment of errors	19	23

JUDD & DETWEILER, PRINTERS, WASHINGTON, MAY 23, 1889.

	Original.	Print.
Order of submission	19	23
Opinion and final decree	20	23
Petition for writ of error	22	25
Copy of writ of error	22	25
Writ of error bond	23	27
Original writ of error	25	28
Original citation	28	29
Assignment of errors	30	30
Clerk's certificate	32	31

1 Supreme Court of Mississippi. October Term, A. D. 1888.

Pleas and proceedings had and done at a regular term of the supreme court of Mississippi, begun and held in the court-room, in the capitol, in the city of Jackson, on the third Monday, the fifteenth day, of October, in the year of our Lord one thousand eight hundred and eighty-eight.

Present: The Honorable J. A. P. Campbell and the Honorable Tim. E. Cooper, associate justices; also Oliver Clifton, clerk of said court, and Wells C. Harrell, marshal.

Proclamation having been duly made, the court proceeded to the dispatch of business.

On the 17th day of October, 1888, there was filed in said supreme court a transcript of a record in the words and figures following, to wit:

Pleas and proceedings had and done at a regular term of the chancery court for the 5th district of the State of Mississippi in and for the 1st district of Hinds county, Honorable Warren Cowan sole — presiding.

At a regular term of the chancery court for the first district of Hinds county, begun and held at the chancery court-room, in the city of Jackson, on the first Monday of September, A. D. 1888.

Present: Warren Cowan, chancellor; W. W. Downing, clerk; S. B. Thomas, sheriff.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY, Complainants,
vs.
S. B. THOMAS, Sheriff and Tax-Collector of Hinds County; G. R. Kemp, Sheriff and Tax-Collector of Madison County; D. C. Love, Sheriff and Tax-Collector of Yazoo County; T. J. Wyatt, Sheriff and Tax-Collector of Holmes County; L. T. Baskett, Sheriff and Tax-Collector of Le Flore County; G. B. Jones, Sheriff and Tax-Collector of Grenada County, Defendants. } No. 808.

THE STATE OF MISSISSIPPI:

In the Chancery Court of Hinds County, for the First District.

To the chancery court of said county, September term, 1888:

The bill of complaint of The Yazoo and Mississippi Valley Railroad Company, complainant, against Samuel B. Thomas, sheriff and tax-collector of Hinds county; G. R. Kemp, sheriff and tax-collector of Madison county; D. C. Love, sheriff and tax-collector of Yazoo county; T. J. Wyatt, sheriff and tax-collector of Holmes county; L. T. Baskett, sheriff and tax-collector of Le Flore county, and G. B. Jones, sheriff and tax-collector of Grenada county, defendants.

Thereupon orator states and shows that it was incorporated by an

act of the Legislature of the State of Mississippi — February 18th, 1882, and entitled An act incorporating the Yazoo and Mississippi Valley Railroad Company and declaring its powers; that orator accepted the charter, organized under it, and proceeded with the work of constructing its railroad and branches, beginning at the
2 city of Jackson, in Hinds county, having the initial point at the Chicago, St. Louis and New Orleans railroad and proceeding through parts of the counties of Hinds, Madison, and Yazoo to Yazoo City, and thence through Yazoo county by the east bank of the Yazoo river, and through the Yazoo valley into Holmes county, with a branch to the town of Lexington, in said county, and by another line of road to Greenwood, in Le Flore county, and thence into Grenada county; that its road to Yazoo City was completed and opened for traffic on the first day of May, 1884—in length 45 miles—and the remainder of said road and branch was finished for traffic by September 1st, 1886, the aggregate mileage being 140 miles.

Orator further states and shows that it has fixed property in each of the counties named, such as station-houses, right of way, roadbed, and other fixtures; that the rolling stock employed by it in traffic is common to the whole line and branches and confined to no county; the domicile in Hinds county.

Orator further states and charges that the enterprise so chartered and projected was deemed hazardous in a financial view by the Legislature and the projectors. The light in which it was contemplated will be best comprehended by a reference of [to] the preamble and the second and eighth sections of the act, and these are accordingly inserted as part of this bill:

Preamble.

Whereas the construction of railroads to, in, through, and along the Mississippi river basin and the Yazoo and Sunflower river basins, penetrating these and other alluvial lands in this State, west of the Chicago, St. Louis and New Orleans railroad, and connecting them by railroad and branches with other railroads west, east, north, and south, is deemed and hereby declared to be a work of great public importance and in strict accordance with true policy and interest of this State, — should be encouraged by legislation and liberality; and

Whereas the physical difficulties of constructing and maintaining railroads to, across, along, or within either the Mississippi, Sunflower, Deer creek, or Yazoo bottoms or basins or the other alluvial lands herein referred to are such that no private company has so far been able to establish a railroad and branches developing said basins and alluvial lands and connecting them with the railroad system of the country:

Now, therefore, in order to induce the investment of capital in the construction and operation of such a railroad and branches, and thus develop the resources of this State, &c.—

SEC. 2. Be it further enacted, That the said corporation shall also

have and it is hereby authorized and invested with the right and power to build and construct and thereafter to use, operate, own, and enjoy a railroad or railroads with one or more tracks into, along, and across that part of the State of Mississippi lying between the Mississippi river and the Chicago, St. Louis and New Orleans railroad, on such line or lines as shall be deemed best by the board of directors of the company hereby chartered, one of the lines or a branch thereof to reach the Mississippi river at or near a point opposite Arkansas City, if practical, so as to connect such point on the east bank of the Mississippi river with some point or points on the line of the Chicago, St. Louis and New Orleans railroad, one of said lines or a branch thereof to pass through Yazoo City, Mississippi; and said company shall have the right and power and are hereby authorized to build one or more branches or lines of railroad between the Mississippi river and Deer creek, and between the Deer creek and the Sunflower river, and between the Sunflower river and the Yazoo river, in the direction of or to the north line of this State, and extend the same or any one thereof in the direction of or to the south boundary line of this State as shall from time to
3 time, in the judgment of the company, be deemed proper; and shall also be authorized to construct and operate such spurs or laterals from or along such line or branches, not exceeding 100 miles in length, as may from time to time be necessary or proper to fully develop said country lying west of the Chicago, St. Louis and New Orleans railroad and east of the Mississippi river, in this State; and the said company, as soon as and whenever from time to time they have located said line or lines of railroad or branches, spurs or laterals thereto, or any of them, shall file in the office of the secretary of state a statement showing the general line thereof, so far as the same has been up to that time located.

SEC. 8. Be it further enacted, That, in order to encourage the investment of capital in the works which said company is hereby authorized to construct and maintain and to make certain in advance of such investment and as an inducement and consideration therefor the taxes and burdens which this State will and will not impose thereon, it is hereby declared that said company, its stock, its railroads and appurtenances, and all its property in this State necessary or incident to the full exercise of all the powers herein granted—not to include compresses and oil mills—shall be exempt from taxation for a term of twenty years from the completion of said railroad to the Mississippi river, not to extend beyond 25 years from the date of this act; and when the period of exemption herein prescribed shall have expired the property of said railway — be taxed at the same rate as other property in this State. All of said taxes to which the property of said company may be subject in this State, whether for county or State, shall be collected by the treasurer of this State and paid into the treasury to be dealt with as the Legislature may direct, but said company shall be exempt from taxation by cities and towns.

Orator states that, viewing the enterprise in the light thus afforded, it is apparent that financial success and the extent of the projected

system of roads would depend upon the settlement of an unsettled swamp country to follow railroad construction, and as the experiment had not been tried it was difficult to determine in advance the direction and termini of roads to be constructed and maintained, so that the number and direction of lines was dependent on indications and tendencies which were to manifest themselves as the enterprise progressed. Large latitude of selection and powers were given, to admit alike of an extended system on a great scale and a more limited scheme, as circumstances and financial practicability might determine. It was hoped that there would grow up gradually, under powers such as these conferred and with the growth of the country, a system of railroads to meet the growing wants; hence orator states there was no requirement of completion to any point, if we except Yazoo City, or between points within any stated time, nor any absolute requirement, if we except the Chicago, St. Louis and New Orleans railroad, of a point of beginning or ending. One line was to go to Yazoo City, on the Yazoo river, always navigable to that point from the Mississippi river, and a line or branch to the Mississippi river, if practicable, and this meant financially practicable; and orator charges that it was not intended as a condition precedent to the enjoyment of the privileges granted, especially not a condition to the enjoyment of the exemption, for it is apparent, as orator insists, from the preamble and said second section that such railroad construction must take place before the Mississippi river could be reached, and that, compatible with the general purpose of the Legislature, a system of roads with large and beneficial proportions might and probably would be constructed before connection with the river would be made or found practicable, and might exist and continue to be of great public utility, although the system might not be connected thus with the river at all, as the event has shown.

4 Orator further states that it was not possible to predict at the date of the act whether the system, after connecting with existing great lines, would ever reach the Mississippi river, and cannot now affirm that such connection is practicable financially, or that it ever will be. It has not been practicable up to this time, and may not lie within the resources of orator to make the connection at all.

Orator further states and charges that it has not doubted the validity of its claim to exemption from taxation by virtue of the said eighth section from the date of the approval of the act of incorporation. It was never denied until the present year by the revenue officers, by whom it is now asserted that orator's exemption will not begin until its road or a branch thereof shall reach the Mississippi river.

Orator insists and charges on belief and legal advice that its exemption began at the date of its charter, and will continue for 25 years from that date. Orator states and charges on belief and advice that it was the intention of the Legislature in said eighth section to grant a period of exemption which should begin at the date of the approval of the act of incorporation absolutely. Its duration

was to be contingent. It was not to extend beyond 25 years from that date and twenty years from completion of a line or branch to the Mississippi river. It was to be terminated by the lapse of 20 years from said completion of a line or branch to the Mississippi or by the lapse of 25 years from the date of the charter, whichever should first happen. There was to be an extreme outer limit beyond which the period would not extend, but short of which it might be made to end, to wit, by the lapse of 20 years from the completion of a line or branch to the river, should that prove practicable.

Orator is convinced and so insists that it was not the purpose of the Legislature to make the aid which was surely intended to be given dependent on a future event which might not occur at all consistently with the main general scheme and the time of its possible occurrence uncertain, for it is obvious (as orator believes it will appear), on considering said preamble and second section, that there would be much beneficial and costly railroad connecting the swamp region needing outlets with the system of railroads in operation, to wit, the Chicago, St. Louis and New Orleans railroad and its numerous connections, as the result has proved, the chief purpose being the development of an inaccessible region by means of bringing it into connection with railroad systems, whether any connection with the Mississippi river should be found practicable by the railroad company or not; and orator charges the fact to be that its constructed road and branches fulfill the expectations of the Legislature and conform to its charter.

Orator, further elucidating the language of said eighth section, states that the Legislature intended the period of exemption to last 20 years after such completion and to begin at the date of the charter, and, so interpreting the sentence "from the completion of said road to the Mississippi river," added the extreme limit of 25 years, lest it might happen that the exemption would become indefinite or perpetual by a failure to extend a "line or branch" to the river for any cause, and assuming that the possibility of such extension would be determined in the space of five years. Orator, further stating, calls attention to the concluding part of the section, which relates to the taxing of a subject thereafter to be created and providing only for a taxation after the period of exemption shall have expired, limiting the taxing power generally and particularly — municipal taxation as indicating the sense in which the exemption was understood, for it appears to orator unreasonable to suppose that the Legislature intended unlimited taxation during the period of greater outlay and less onerous taxation after the time of income.

And orator so states the fact to be, that it accepted the charter and entered upon the doubtful enterprise on the faith of an exemption from taxation, beginning at the date of the charter, and has acted on this belief, declining to pay taxes, and that this belief was shared by the revenue officers of the State and their advisers for four or five years.

Orator further complains and charges that, notwithstanding the

true intent and just operation of the said 8th section of the charter aforesaid, it is asserted and claimed by those exercising public authority of our State relating to the taxation of railroads that orator's road and property is not exempt thereby; that such exemption was not intended to begin until the completion of said road to the Mississippi river, and will not begin prior to that event; and on this view and claim proceedings have been set on foot—on the assertion and claim that an act of the Legislature of Mississippi entitled "An act to provide for the assessment and collection of past-due and unpaid taxes on railroads which have escaped the payment of taxes," approved April 3rd, 1888, applies and was, in fact, intended to apply to orator's road; said act provides as follows:

SECTION 1. Be it enacted, &c., &c., That every railroad which has failed to pay the taxes for which it was liable, for any year for which it was liable, such railroad not being exempt by law or its charter from taxation for such years, and so being liable to taxation, shall be assessed for and shall pay an ad valorem tax, to be assessed as hereinafter provided unless such railroad shall, within sixty days after the passage of this act, pay the taxes for which the same was liable, according to its charter, or shall pay the privilege taxes for which the same was liable, as follows: If a standard or broad gauge road, for the years prior to 1884, eighty dollars per mile; for the years 1884 and 1885, one hundred dollars per mile, and for the — 1886 and 1887, one hundred and twenty-five dollars per mile; road of narrow gauge to pay less. Orator states that its road belongs to class indicated as standard or broad gauge.

Orator further shows that by the 2nd section of this act the tax-collectors of the several counties through which any railroad runs, being a road not exempt from and not paying tax, shall assess the same as additional assessment, in their respective counties, for the years in which they were taxable and in default, on list to be prepared by the railroad commission, whose duty it is to prepare such list. There is a direction to collectors to follow as near as practicable the provisions of section 513 of the code of 1880, respecting lands left unassessed; and said 2nd section further provides that lists so made out, to secure uniformity of taxation, shall be forwarded to the railroad commission on or before the 1st day of June next, and said commission shall, on the 1st Monday in July thereafter, proceed to consider said list and equalize the valuation therein and raise or reduce the same as they shall deem just and proper; and it is also provided that the commission shall hear objections to such assessments. The State and the tax-payer have each the right of appeal from any decision of questions affecting such assessments to the circuit court and from there to the supreme court; otherwise the determination of the commission to be final — conclusive; the appeal to be in ten days and the appealing railroad to give bond in double the amount of all the taxes assessed, and on affirmance of the assessment judgment shall be for whole amount of the taxes assessed and ten per cent. damages against
6 the railroad and sureties on the bond; and by other sections of said act it is provided that the collectors and railroad com-

mission shall follow sec. 600 of the code of 1880 as far as practicable in equalizing and correcting said assessments; that where the lists shall have been revised and adjusted by the railroad commission they shall be returned to the tax-collector, who, upon receipt thereof, shall place State taxes, county taxes, and levee taxes in separate columns, after which the collector shall proceed to collect taxes so assessed in the manner taxes on land are collected and enforce said collection, and in case of sale for taxes shall be governed by sec. 558 of the code of 1880 and other provisions relating to sales, and personal property shall be seized and sold for such taxes as the property of individuals is sold. Orators refer for greater certainty to the statutes of 1888, published by authority, page 49. Orator states and charges that, applying this act to its railroad, the said collectors have followed its provisions and treated orator's road as delinquent for the State and county taxes of the years 1885, 1886, 1887, and made out and forwarded the list of assessment for the counties of Hinds, Madison, Yazoo, Holmes, Le Flore, and Grenada to said railroad commission to be corrected and equalized in valuation as respects both its fixed property in real estate and fixtures and the rolling stock and personalty.

And orator states that, on the first Monday of July, 1888, said railroad commission proceeded under said act of 1888 to revise said assessment lists for the several counties mentioned and for the years 1885, 1886, 1887, and 1888, and equalize and adjust the said lists, and caused the revised lists to be sent to the several sheriffs and collectors aforesaid, appending to each list for each of said years aforesaid a certificate, signed by each of said members of said railroad commission, in these words following, to wit: "We, the undersigned, railroad commissioners of the State of Mississippi, hereby certify that the foregoing is a true and correct assessment list of that portion of the Yazoo and Mississippi Valley railroad, situate in the county of Hinds, in said State, as revised by us under and by virtue of the laws of Mississippi;" that this certificate, with appropriate changes of the name of counties, is attached to the list for each of the years, and said list may be described without more particular mention as containing the number of miles in the county, the valuation per mile being for the earlier year $10,000.00 per mile, and for the later $15,000.00 per mile; the number and value of stations, the number and value of sidings, the number of passenger cars and of freight cars and their value, hand cars, water tanks; that for the county of Hinds the aggregate assessment amounts to, for the years 1885, '6, '7, $13,514.00, $12,285.00 without damages; for the county of Madison, 1885, '6, '7, $7,859.90; for the county of Yazoo, 1885, '6, '7, $15,906.00; for the county of Holmes, 1887, $8,728.15; for the county of Le Flore, 1887, $3,461.27; for the county of Grenada, 1887, $2,064.97.

Orator states that the assessment for the year 1888 is not intended to be collected until the annual collection of State and county taxes shall take place, but for the antecedent years the collections are to be made at once and without delay; that the sheriff of Hinds county has already seized some of orator's cars and locomotives, and has

given notice to orator of his purpose to enforce collection by sale, and other rolling stock which for the time being was found in his county; and the sheriff of other counties named threaten to proceed and will proceed to seize and sell orator's rolling stock that chances to be found in their several counties unless restrained, and as there is not enough of such personal property to satisfy the large amount of taxes claimed, orator's stations and right of way will be sold to satisfy this assessment, and have been levied upon in Yazoo county.

7 Orator charges that the effect of these forcible and unwarranted proceedings will be to render it impracticable for orator to perform its duties as a common carrier and derange the business of its road and affect the public injuriously, as well as causing great pecuniary *to* loss to orator—a loss difficult to estimate and indeed incalculable; that to resist legally in each of the counties by separate proceedings would lead to multiplicity of suits to settle one question applicable to all, and therefore your orator has included all the collectors in one suit.

And therefore orator charges that its property is not subject to the taxes according to its charter, and said proceedings — without legal authority; that to apply all the act of 1888 as respects railroads which have "escaped" taxation to orator's road will be to violate the charter contract, which exempts orator's road from taxation; that such application of said act is the same as a repeal or revocation of the grant of exemption and therefore in violation of the Constitution of the United States forbidding such violation; that to impute a legislative intent to compel orator to pay taxes is to render said act of 1888 an act impairing the obligations of contracts and void, because in violation of the Constitution of the United States, as well as the constitution of this State, which contains a like prohibition. Orator claims that its exemption from taxation is a contract, and protected by the Constitution of the United States.

Orator further charges that to uphold the proceedings to collect said taxes by virtue of the act of 1888 aforesaid is to uphold the law or authority of the State of Mississippi against the claim of orator arising under the Constitution of the United States.

Orator is advised and so charges that it has no adequate remedy at law for the threatened wrong—a wrong which will be repeated from year to year; that the defendants are not pecuniarily able to respond in damages if sued at law, if such damages could be estimated; that the most inexpensive and simple and the only adequate remedy is by one bill to bring the claim of orator before this honorable court for adjudication and by obtaining an injunction restraining the said sheriffs from proceeding further under the authority of said act of 1888, and on the hearing to make such injunction perpetual.

Orator therefore prays that said several sheriffs be made defendants to this bill by the proper process of subpœna, and be required to answer the same, and that on final hearing of the matters thereof that orator's right to exemption be established; that the proceedings aforesaid under the authority aforesaid are void and illegal, and in

the meanwhile that the defendants be enjoined from further proceeding to collect said taxes until further order of the court.

YAZOO & MISS. VALLEY R. R. CO.,
By J. G. MANN, *Sup't.*

C. V. GWIN,
W. P. & J. B. HARRIS, *Sols.*

THE STATE OF MISSISSIPPI, }
Hinds County. }

Personally came before the undersigned, chancery clerk in and for the county and State aforesaid, John G. Mann, who, first being duly sworn, on his oath states that he is the agent and general superintendent of the Yazoo and Mississippi Valley railroad, and has knowledge of the material facts set forth in the foregoing bill of complaint of said company, and that the same are true in substance, according to his knowledge, information, and belief.

Given under my hand and official seal this the 11th day of July, A. D. 1888.

W. W. DOWNING, *Clerk*,
By RAMSEY WHARTON, *D. C.*

8 THE STATE OF MISSISSIPPI, }
Hinds County. }

The clerk of the chancery court of Hinds county is hereby directed to issue writs of injunction to the several defendants in the foregoing bill to stay further proceedings to collect the taxes complained of from the complainant in said bill, according to the prayer of the bill, until the further order of the chancery court of Hinds county for the 1st district or other proper order in the premises upon the filing of the foregoing bill and the bond attached, which I have this day approved.

TIM. E. COOPER, *Judge.*

Jackson, Miss., July 18th, 1888.

Filed and injunctions issued July 17th, 1888.

W. W. DOWNING, *Clerk.*
RAMSEY WHARTON, *D. C.*

STATE OF MISSISSIPPI, }
Hinds County. }

Know all men by these presents that we, Yazoo and Mississippi Valley Railroad Company, principal, and C. V. Gwin, S. D. Gwin, John T. Nixon, G. W. Shackleford, W. P. Harris, James Fentress, H. A. Barr, The Mississippi Railroad Company, and Illinois Central Railroad Company, R. H. Hudson, sureties, are held and firmly bound unto the State of Mississippi in the sum of one hundred and three thousand two hundred and eighty-six $\frac{28}{100}$ dollars, to be paid to the State of Mississippi; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated the 18th day of July, A. D. 1888.

The condition of the above obligation is such that whereas the above-bound Yazoo and Mississippi Valley Railroad Company has this day prayed and obtained from the Honorable Tim. E. Cooper, judge of the supreme court of Mississippi, an injunction staying the collection of State and county taxes assessed against it in the counties of Hinds, Madison, Yazoo, Holmes, Le Flore, and Grenada, amounts [amounting] in the aggregate to fifty-one thousand six hundred and twenty-five $\frac{14}{100}$ dollars, and the same is directed to be issued and served upon the sheriffs and tax-collectors of the said counties upon the condition that upon the filing of the bill of complaint of the said railroad company against the said sheriffs and tax-collectors the said company shall execute bond:

Now, therefore, if the said railroad company shall not prosecute said suit with effect, and in case said injunction shall be dissolved shall well and truly pay all taxes so enjoined, together with all damage and costs, then this obligation shall be void; otherwise to remain in full force and effect.

YAZOO AND MISSISSIPPI
R. R'D CO.,
W. P. HARRIS,
Ag't and Att'y of Record.
S. D. GWIN,
By C. V. GWIN, *Att'y-in-Fact.*
JNO. T. NIXON,
By C. V. GWIN, *Att'y-in-Fact.*
G. W. SHACKLEFORD,
By C. V. GWIN, *Att'y-in-Fact.*
C. V. GWIN.
JAMES FENTRESS.
MISSISSIPPI VALLEY COMPANY,
By JAMES FENTRESS, *Gen'l Sol.*
ILLINOIS CENTRAL RAILROAD COMPANY,
By JAMES FENTRESS, *Gen'l Sol.*
H. A. BARR.
R. G. HUDSON.

9 STATE OF MISSISSIPPI, }
County of Hinds. }

Know all men by these presents that we, S. D. Gwin, G.W. Shackleford, and Jno. T. Nixon, of the county and State aforesaid, do by these presents make and constitute and appoint C. V. Gwin our true and lawful agent and attorney-in-fact, and for us and in our names we do hereby authorize and empower him to sign, seal, and deliver, as sureties for the Yazoo and Mississippi Valley Railroad Company, a bond or bonds amounting in the aggregate to $123,000.00, be the same more or less, required by the law of said railroad company in two certain suits by said company enjoining the State, county, and levee taxes, by the tax-collectors of the counties through which the railroad of said company runs, one of which

suits is by bill in chancery court of Hinds county, and the other of said suits is by bill in equity in the circuit court of the United States for the southern district of Mississippi; and, further, we do authorize and fully empower the said C. V. Gwin in his discretion to sign, seal, and deliver, for us and in our names, as sureties for said company, any bond or bonds for whatever amount that may be required of said railroad company to enable it to sue out and obtain writs of injunction against the collection of taxes aforesaid, and all his acts and doings in this behalf shall be as conclusively binding on us as if we were personally present and acting in our own proper persons.

In testimony whereof we have hereunto set our hands and affixed our seals this the 14th day of July, 1888.

S. D. GWIN. [SEAL.]
J. T. NIXON. [SEAL.]
G. W. SHACKLEFORD.

STATE OF MISSISSIPPI, }
County of Hinds. }

Before me, the undersigned, —— ——, of said county and State, this day personally appeared the above-named S. D. Gwin, J. T. Nixon, and G. W. Shackleford, who severally acknowledged to me that they signed, sealed, and delivered the foregoing power of attorney as their voluntary act and deed on the day and year therein mentioned; and the said S. D. Gwin, first being duly sworn, on oath doth say that he is the lawful owner and in possession of property amounting in actual cash value to the sum of twenty-five thousand dollars over and above his just debts and legal liabilities and exemptions—that is to say, he is the owner and possessor in his own right of lands situate in said county of the actual cash value of $20,000, and he is the owner and possessor in his own right of personalty situated in said county of the value of $5,000.00 over and above said liabilities and exemptions; and the said Jno. T. Nixon, being by me first duly sworn, upon his oath doth say that he is the lawful owner and in the possession of property amounting in actual cash value to the sum of twenty-five thousand dollars over and above his just debts, legal liabilities, and exemptions—that is to say, he is the owner and possessor in his own right of lands situate in said county of the value of $20,000.00, and he is the owner and possessor in his own right of personalty situated in said county of the value of $5,000.00 over and above said liabilities and exemptions.

And the said G. W. Shackleford, being by me duly sworn, upon his oath doth say that he is the lawful owner and in the possession of his own right of property amounting in actual cash value to $10,000.00 over and above his just debts and legal liabilities and exemptions—that is to say, he is the owner and possessor in his own right of lands situate in said county of the actual cash value of $10,000.00 over and above his liabilities and exemptions.

S. D. GWIN.
J. T. NIXON.
G. W. SHACKLEFORD.

Given under my hand and seal of said court this the 14 day of July, 1888.

JNO. H. McBEE, *Clerk*,
By E. D. McBEE, *D. C.*

STATE OF MISSISSIPPI, }
County of Hinds. }

Before me, the undersigned, clerk of the supreme court of Mississippi, this day personally appeared C. V. Gwin, who, being by me duly sworn, upon his oath doth say that he is the lawful owner and in possession of property situate in said State amounting in actual cash value to the sum of fifteen thousand dollars over and above his just debts and legal liabilities and exemptions—that is to say, he is the lawful owner and in the possession of lands situate in said State of the value of $12,500.00, and he is the lawful owner and in the possession of personalty of the value of $2,500.00.

And also personally appeared before me W. P. Harris, who, being by me first duly sworn, upon his oath doth say that he is the lawful owner and is in the possession of property situate in said State amounting in actual cash value to the sum of $10,000.00 over and above his just debts, legal liabilities, and exemptions.

C. V. GWIN.
W. P. HARRIS.

Sworn to and subscribed before me this the 16 day of July, A. D. 1888.

OLIVER CLIFTON, *Clerk*,
[L. S.] By C. C. CAMPBELL, *D. C.*

STATE OF MISSISSIPPI, }
County of Hinds. }

This day personally appeared before the undersigned, —— ——, R. G. Hudson, whose name appears in the foregoing bond, and says on oath that he is worth the sum of five thousand dollars in property in said State liable to execution over and above his legal liabilities and exemptions.

R. G. HUDSON.

Sworn to and subscribed before me this the 18th day of July, A. D. 1888.

TIM. E. COOPER, *Judge, &c.*

I approve the foregoing bond this July 18th, 1888.

TIM. E. COOPER, *Judge, &c.*

Filed as approved July 17th, 1888.

W. W. DOWNING, *Clerk.*
RAMSEY WHARTON, *D. C.*

THE STATE OF MISSISSIPPI,
Chancery Court, Hinds County, } *To wit:*

To D. C. Love, sheriff and tax-collector of Yazoo county, Greeting:

Whereas it hath been represented to us, in our said court
11 of chancery, on the part of Yazoo and Mississippi Valley Railroad Company, complainant, that it has lately exhibited its bill against you & S. B. Thomas, T. J. Wyatt, L. T. Baskett, defendants, to be relieved touching the matters in said bill contained:

We therefore, in consideration of the premises and of the allegations in said bill contained, strictly enjoin you, the said D. C. Love, sheriff and tax-collector aforesaid, under the penalty of one thousand dollars, to be levied of your goods and chattels, lands and tenements, to our use, that you absolutely refrain from any and all further proceedings to enforce the collection of State and county taxes against the Yazoo — Mississippi Valley Railroad Co. by the seizure or sale of the railroad of said company or any part thereof, the rolling stock, stations, tanks, and other fixtures or appurtenances, or by any other means, and from any further proceedings against the said complainant touching any of the matters in said bill contained until our said court shall make another order to the contrary.

Issued the 18 day of July, 1888.

To the coroner of Yazoo county to execute and return.

W. W. DOWNING, *Clerk.*

[L. S.] RAMSEY WHARTON, *Dep. Clerk.*

I hereby acknowledge service of the within writ of injunction on me this the 20th day of July, 1888.

D. C. LOVE,
Sheriff and Tax-Collector of Yazoo County.

THE STATE OF MISSISSIPPI,
Chancery Court, Hinds County, } *To wit:*

To L. T. Baskett, sheriff and tax-collector of Le Flore county, Greeting:

Whereas it hath been represented to us, in our said court of chancery, on the part of Yazoo — Mississippi Valley Railroad Company, complainant, that it hath lately exhibited its bill against you, S. B. Thomas, T. J. Wyatt, D. C. Love, G. R. Kemp, and G. B. Jones, defendants, to be relieved touching the matters in said bill contained:

We therefore, in consideration of the premises and of the allegations in said bill contained, strictly enjoin you, the said L. T. Baskett, under the penalty of one thousand dollars, to be levied of your goods and chattels, lands and tenements, to our use, that you absolutely refrain from any and all further proceedings to enforce the collection of State and county taxes against the Yazoo and Mississippi — Railroad Company by the seizure or sale of the railroad of said company or any part thereof, its rolling stock, stations, tanks,

and other fixtures or appurtenances, or by any other means, and from any further proceedings against the said complainant touching any of the matters in said bill contained until our said court shall make another order to the contrary.

Issued the 18 day of July, 1888.

To the coroner of Le Flore county to execute and return.

W. W. DOWNING, *Clerk.*

[L. S.] RAMSEY WHARTON, *Dep. Clerk.*

I hereby acknowledge the service of this writ of injunction this the 20 day of July, 1888.

L. T. BASKETT,
Sheriff & Tax-Collector, Le Flore County.

12 THE STATE OF MISSISSIPPI, *Chancery Court, Hinds County,* } *To wit:*

To G. R. Kemp, sheriff and tax-collector of Madison county, Greeting:

Whereas it hath been represented to us, in our said court of chancery, on the part of Yazoo and Mississippi Valley Railroad Company, complainant, that it has lately exhibited its bill against you, S. B. Thomas, D. C. Love, L. T. Baskett, T. J. Wyatt, & G. B. Jones, defendants, to be relieved touching the matters in said bill contained:

We therefore, in consideration of the premises and of the allegations in said bill contained, strictly enjoin you, the said G. R. Kemp, sheriff and tax-collector aforesaid, under a penalty of one thousand dollars, to be levied of your goods and chattels, lands and tenements, in [to] our use, that you absolutely refrain from any and all further proceedings to enforce the collection of State and county taxes against the Yazoo — Mississippi Valley Railroad Company by the seizure or sale of the railroad of said company or any part thereof, its rolling stock, stations, tanks, or other fixtures and appurtenances, or by any other means, and from any further proceedings against the said complainant touching any of the matters in said bill contained until our said court shall make another order to the contrary.

Issued the 18 day of July, 1888.

To the coroner of Madison county to execute and return.

W. W. DOWNING, *Clerk.*

[L. S.] RAMSEY WHARTON, *Dep. Clerk.*

Received 19 July, 1888.

A. J. PARROTT, *Coroner.*

Executed personally on G. R. Kemp, sheriff of Madison county, this 19th July, 1888.

Coroner's fees, $2.00.

A. J. PARROTT.

THE STATE OF MISSISSIPPI,
Chancery Court, Hinds County, } *To wit:*

To G. B. Jones, sheriff and tax-collector of Grenada county, Greeting:

Whereas it hath been represented to us, in our said court of chancery, on the part of Yazoo and Mississippi Valley Railroad Company, complainant, that it has lately exhibited its bill against you and S. B. Thomas, D. C. Love, G. R. Kemp, L. T. Baskett, T. J. Wyatt, defendants, to be relieved touching the matters in said bill contained:

We therefore, in consideration of the premises and of the allegations in said bill contained, strictly enjoin you, the said G. B. Jones, sheriff and tax-collector aforesaid, under the penalty of one thousand dollars, to be levied of your goods and chattels, lands and tenements, to our use, that you absolutely refrain from any and all further proceedings to enforce the collection of State and county taxes against the Yazoo and Mississippi Valley Railroad Company by seizure or sale of the railroad of said company or any part thereof, its rolling stock, stations, tanks, and other fixtures and appurtenances, or by any other means, and from any further proceedings against the said complainant touching any of the matters in said bill contained until our said court shall make another order to the contrary.

Issued the 18 day of July, 1888.

To the coroner of Grenada county to execute and return.

W. W. DOWNING, *Clerk.*
RAMSEY WHARTON, *Dep. Clerk.*

13 I hereby acknowledge the service of the within writ of injunction on me this the 21 day of July, 1888.

G. B. JONES,
Sheriff and Tax-Collector, Grenada County.

THE STATE OF MISSISSIPPI,
Chancery Court, Hinds County, } *To wit:*

To T. J. Wyatt, sheriff and tax-collector of Holmes county, Greeting:

Whereas it hath been represented to us, in our said court of chancery, on the part of Yazoo and Mississippi Valley Railroad Company, complainant, that it has lately exhibited its bill against you, S. B. Thomas, D. C. Love, T. L. Baskett, G. R. Kemp, G. B. Jones, defendants, to be relieved touching the matters in said bill contained:

We therefore, in consideration of the premises and of the allegations in said bill contained, strictly enjoin you, the said T. J. Wyatt, said sheriff and tax-collector aforesaid, under the penalty of one thousand dollars, to be levied of your goods and chattels, lands and tenements, to our use, that you absolutely refrain from any and all

further proceedings to enforce the collection of State and county taxes against the Yazoo and Mississippi Valley Railroad Company by the seizure or sale of the railroad of said company or any part thereof, its rolling stock, stations, tanks, and other fixtures or appurtenances, or by any other means, and from any further proceedings against the said complainant touching any of the matters in said bill contained until our said court shall make another order to the contrary.

Issued the 18 day of July, 1888.

To the coroner of Holmes county to execute and return.

W. W. DOWNING, *Clerk.*

[L. S.] RAMSEY WHARTON, *Dep. Clerk.*

I hereby acknowledge service of this writ of injunction this the 19th July, 1888.

T. J. WYATT, *Sheriff.*

THE STATE OF MISSISSIPPI, *Chancery Court, Hinds County,* } *To wit:*

To Samuel B. Thomas, sheriff and tax-collector of Hinds county, Greeting:

Whereas it hath been represented to us, in our said court of chancery, on the part of The Yazoo and Mississippi Valley Railroad Company, complainant, that it has lately exhibited its bill against you and D. C. Love, T. J. Wyatt, L. T. Baskett, R. G. Kemp, G. B. Jones, defendants, to be relieved touching the matters in said bill contained:

We therefore, in consideration of the premises and of the allegations in said bill contained, strictly enjoin you, the said Samuel B. Thomas, sheriff and tax-collector aforesaid, under the penalty of one thousand dollars, to be levied of your goods and chattels, lands and tenements, to our use, that you absolutely refrain from any and all further proceedings to enforce the collection of State and county taxes against the Yazoo & Mississippi Valley Railroad Company by the seizure or sale of the railroad of said company or any part thereof, its rolling stock, stations, tanks, or other fixtures or appurtenances, or by any other means, and from any further proceedings
14 against the said complainant touching any of the matters in said bill contained until our said court shall make another order to the contrary.

Issued the 18 day of July, 1888.

To the coroner of Hinds county to execute and return.

W. W. DOWNING, *Clerk.*

RAMSEY WHARTON, *Dep. Clerk.*

Received and executed July 18, 1888.

A. L. ROUX, *Coroner.*

STATE OF MISSISSIPPI,
Hinds County.

Chancery Court, First District.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY
vs.
S. B. THOMAS *et al.*, Sheriffs and Tax-Collectors.

And the said defendants, by protestation, &c., without admitting or denying any or all of the several allegations of the said complaint, demur thereto and say the same are insufficient in law to entitle the said complainant to the specific relief prayed for or to any other relief, and for cause of demurrer state the following grounds:

1. There is no equity upon the face of said bill.
2. This court is without jurisdiction of the subject-matter, there being adequate remedy at law.
3. Other causes upon the face of said bill of complaint. Wherefore the defendants pray the judgment of this court whether they ought to be required to make further answer in the premises.

T. M. MILLER,
Att'y Gen'l, Sol. for Def'ts.

I certify that the foregoing demurrer, in my opinion, is well taken in point of law.

T. M. MILLER, *Sol'r, &c.*

Filed this Sept. 3rd, 1888.

W. W. DOWNING, *Clerk.*
RAMSEY WHARTON.

Chancery Court, Hinds County, Mississippi.

YAZOO AND MISS. VALLEY R. R. CO.
vs.
SHERIFF OF HINDS CO. *et al.*

The said defendants, by protestation, not confessing all or any of the matters and things in the complainant's bill contained to be true as therein alleged, doth demur thereto, and for cause showeth—

1st. That complainant hath not made or stated such a case as entitles him [it] to any relief from this court.

2nd. Because it was not in the power of the Legislature, under the constitution and laws of this State, to make such a contract as is alleged in said bill. The Legislature cannot contract away its taxing power.

3rd. Because the Legislature could not exempt complainant's property from taxation without exempting all property of like
15 class or kind. All taxes must be equal and uniform, and the Legislature cannot make invidious distinctions in the exemption of either individuals or corporations, and at the time of the

grant of complainant's charter and each year since then the property of said company has been selected by the Legislature as an object of taxation.

4th. Because it is alleged in said bill that complainant's railroad had not been completed to the Mississippi river.

5th. Because complainant's charter does not relieve it of the payment of the county taxes.

Wherefore, and for divers other causes of demurrer appearing in the said bill, the defendant doth demur thereto and humbly demands the judgment of this court whether he should be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

HOOKER & WILSON, *Att'ys.*
T. M. MILLER.

I certify that, in my opinion, the above demurrer is well taken.

H. S. HOOKER,
Sol. for Def't.

Filed September 6th, 1888.

W. W. DOWNING, *Clerk.*
RAMSEY WHARTON, *D. C.*

YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY
vs.
SAM'L THOMAS, Sheriff, *et al.*

Set for hearing on the demurrer of defendants.

W. P. HARRIS,
Sol'r for Compl'ts.

Filed Sept. 6, 1888.

W. W. DOWNING, *Clerk.*
RAMSEY WHARTON, *D. C.*

YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY
vs.
SAM'L THOMAS, Sheriff, *et al.*

It is agreed in this case that if it shall appear hereafter that the several amounts of State and county taxes given in the final decree in this cause, as assessed in the different counties mentioned in the decree, are incorrect, when compared with the actual assessments made, the error may be corrected by said list, so that the actual amount of the taxes, with the damages for injunction —.

Aug. 9th, 1888.

T. M. MILLER, *For Def'ts.*
W. P. & J. B. HARRIS,
For Compl'ts.

Filed Sept. 7th, 1888.

W. W. DOWNING, *Clerk.*
RAMSEY WHARTON, *D. C.*

16 THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY
vs.
SAMUEL B. THOMAS *et al.*
} Final Decree.

This cause coming on to be heard upon the demurrer of all the defendants to said bill of complaint, and the court, having heard the arguments of counsel and being thereof sufficiently advised, doth order, adjudge, and decree that said demurrer be, and the same is hereby, sustained and said bill of complaint dismissed, and, proceeding to render its final decree, a reference being waived and the statement of its bill as to the amount of taxes enjoined accepted as correct, doth order, adjudge, and decree that said complainant and W. P. Harris, S. D. Gwin, John T. Nixon, Geo. W. Shackleford, C. V. Gwin, James Fentress, the Mississippi Valley — Company, the Illinois Central Railroad Company, H. A. Barr, R. G. Hudson, the sureties on its injunction herein, shall, within thirty days from this date, pay to the defendant Thomas, sheriff and tax-collector of Hinds county, for the use of the State and said county, the sum of thirteen thousand five hundred and fourteen —, $13,514.00, together with ten per centum damages thereon, making the aggregate amount to be paid to the defendant Thomas fourteen thousand eight hundred and sixty-five $\frac{40}{100}$ dollars ($14,865.40); to the defendant Kemp, sheriff and tax-collector of Madison county, for the use of the State and said county, the sum of seven thousand eight hundred and fifty-nine $\frac{90}{100}$ dollars ($7,859.90), together with ten per centum damages thereon, making the aggregate sum to said Kemp eight thousand six hundred and forty-five $\frac{89}{100}$ ($8,645.89), and to defendant Wyatt, sheriff and tax collector — Holmes county, for the use of the State and said county, eight thousand seven hundred and twenty-eight $\frac{15}{100}$ dollars ($8,728.15), together with ten per centum damages thereon, making the aggregate sum to said Wyatt, tax-collector, nine thousand six hundred $\frac{96}{100}$ dollars, and to defendant, D. C. Love, sheriff and tax-collector of Yazoo county, for the use and benefit of the State and said county, the sum of fifteen thousand nine hundred and six dollars, $15,906.00, together with ten per centum damages thereon, aggregating the sum to be paid defendant Love seventeen thousand four hundred and ninety-six $\frac{60}{100}$ dollars ($17,496.60), and to the defendant, L. T. Baskett, sheriff and tax-collector of Le Flore county, for the use of the State and said county, the sum of three thousand four hundred and sixty-one $\frac{27}{100}$ dollars, together with ten per centum damages thereon, making the aggregate amount to be paid to said last-named defendant three thousand eight hundred and seven $\frac{39}{100}$ dollars ($3,807.39), and to the defendant, G. B. Jones, sheriff and tax-collector of Grenada county, for the use of the State and said county, the sum of two thousand and sixty-four $\frac{97}{100}$ dollars, together with ten per centum damages thereon, making the aggregate amount to be paid to said last-named defendant two thousand two hundred and seventy $\frac{69}{100}$ dollars, the said several sums of money being the taxes enjoined in said coun-

ties, respectively, with the damages allowed by law. It is further ordered and decreed that complainant and its said sureties pay all the costs of these proceedings, and that if said several sums of money shall not be paid within the thirty days aforesaid execution shall issue therefor as at law against said complainant and said sureties. It is further ordered, adjudged, and decreed, and the court doth further order, adjudge, and decree, that the said several sums of money above adjudged to be paid shall be, and the same are hereby, adjudged to be paramount to liens in said respective counties
17 upon the property of complainant therein assessed, respectively; and if the said sums shall not be paid or levied according to the requirements of this decree jurisdiction of this court is hereby reserved solely for the purpose of fixing and adjusting said liens and causing the property charged to be sold in satisfaction. Ordered and decreed this Sept. 7, 1888.

And said complainant having prayed an appeal from this decision to the next term of the supreme court, to operate as a supersedeas, and solicitors for defendants agreeing in open court that a bond in the penalty of fifty-five thousand dollars may be accepted, it is ordered that said appeal be allowed, and to operate as a supersedeas upon complainant entering into bond therefor in the penalty of fifty-five thousand dollars, conditioned according to law, with at least two sureties to be approved by the clerk of this court.

Ordered, adjudged, and decreed this the 7th day of September, 1888.

WARREN COWAN, *Chancellor.*

Filed Sept. 7th, 1888.

W. W. DOWNING, *Clerk.*
RAMSEY WHARTON, *D. C.*

STATE OF MISSISSIPPI, }
County of Hinds. }

In the Chancery Court of said County for the First Chancery District thereof.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY, Complainant,
v.
S. B. THOMAS *et al.*, Sheriffs and Tax-Collectors, Defendants.

To the chancellor or to the clerk of said chancery court:

Your petitioner, the complainant in the above-styled cause, respectfully states that in the chancery court aforesaid, at its September term, 1888, by the consideration of the court aforesaid, judgment was rendered against your petitioner, The Yazoo and Mississippi Valley Railroad Company, and its sureties on its bond for injunction, issued and granted in said cause, for the sum of $56,686.53 in the aggregate. Your petitioner and its sureties feel aggrieved by the rendition of said decree against them, and now pray an appeal therefrom to the October term, A. D. 1888, supreme court of State of

Mississippi, and now tender a bond, conditioned in the penalty of $55,000.00, as fixed by the decree in said — according to law, to supersede said decree.

W. P. & J. B. HARRIS,
C. V. GWIN,
Sols. for Petitioner.

THE STATE OF MISSISSIPPI, }
Hinds County. }

I, W. W. Downing, clerk of the chancery court in and for the county and State aforesaid, hereby certify that the 34 preceding pages contain a full and true copy of all the proceedings had and done in this cause as the same appears of record in my office, at Jackson, Miss.

Witness my hand and official seal, at office, this the 17th day of Sept., A. D. 1888.

W. W. DOWNING, *Clerk.*
[SEAL.] RAMSEY WHARTON, *D. C.*

18 *Appeal Bond to Supreme Court.*

THE STATE OF MISSISSIPPI, }
Hinds County, } *ss:*

Know all men by these presents that we, The Yazoo & Mississippi Valley Railroad Company, C. V. Gwin, S. D. Gwin, John T. Nixon, Geo. W. Shackleford, W. P. Harris, James Fentress, H. A. Barr, R. G. Hudson, The Mississippi Valley Co., & The Illinois Central Railroad Company, as principals, and John Hart, Byron Lemly, & P. W. Peeples, sureties, are held and firmly bound unto the State of Mississippi in the penal sum of fifty-seven thousand dollars; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Signed and delivered the 13 day of September, 1888.

The condition of the foregoing obligation is such that whereas, in a cause lately pending in the chancery court of 1st district of Hinds county, in which the said Yazoo — Mississippi Valley Railroad Company was complainant and S. B. Thomas and others, sheriffs, and so forth, were defendants, a decree was rendered in favor of said defendants, dismissing complainant's bill, at the September term of said court, on the — day of September, 1888, and the said Yazoo & Mississippi Valley Railroad Company has prayed and obtained an appeal to the supreme court: Now, if the said appellant shall well and truly pay and satisfy the said decree, together with all the costs of the lower court and of this appeal, and also such final judgment as may — rendered against it in the Supreme Court

in case said judgment be affirmed, then this obligation to be void; otherwise to remain in full force and virtue.

YAZOO & MISSISSIPPI VALLEY
R. R. CO.,
By J. B. HARRIS, *Att'y of Record.*
ILLINOIS CENTRAL RAILROAD
COMPANY,
By W. P. HARRIS,
Agent and Attorney of Record.
MISSISSIPPI VALLEY COMPANY,
By W. P. HARRIS,
Agent and Attorney of Record.
JOHN HART.
B. LEMLY.
P. W. PEEPLES.

The foregoing bond approved 14 day of September, 1888.

W. W. DOWNING,
Chancery Clerk.
RAMSEY WHARTON, *D. C.*

Justification of Sureties.

THE STATE OF MISSISSIPPI, }
Hinds County, } *ss:*

This day personally appeared before the undersigned, clerk of the chancery court in and for said county, the within-named sureties, who, being by me duly sworn, made oath, each for himself, that he is worth, in freehold estate, over and above all legal exemption and all his debts and liabilities, the sum hereinafter set opposite his name—that is to say:

The said John Hart, the sum of 20,000 dollars.
The said B. Lemly, the sum of 20,000 dollars.
The said P. W. Peeples, the sum of 17,000 dollars.

Sworn to and subscribed before me this the 14th day of September, 1888.

[SEAL.]

W. W. DOWNING, *Clerk.*
RAMSEY WHARTON, *D. C.*

Approved and filed Sept. 14, 1888.

W. W. DOWNING, *Clerk.*
RAMSEY WHARTON, *D. C.*

19 The foregoing record endorsed as follows: No. 5857. Yazoo & Mississippi Valley Railroad Co. *et al. v.* S. B. Thomas *et al.*, sheriffs and tax-collectors. Filed Oct. 17, 1888. Oliver Clifton, clerk.

Proceedings in Supreme Court.

On the 25th day of October, 1888, a day of the regular October term, A. D. 1888, of said supreme court, there was filed in this cause the assignment of errors in words and figures following, to wit:

In the Supreme Court. Oct. Term, 1888.

YAZOO & MISS. VALLEY RAILROAD CO. v. S. B. THOMAS, Tax-Collector, *et al.* } Appeal, Hinds Chan. Court.

The appellant comes and says there is, in the proceedings and decree in the court below, error in this:

1st. That the court below erred in sustaining the demurrer to the appellant's bill.

2nd. The court below erred in dismissing appellant's bill and decreeing payment of the taxes enjoined.

W. P. & J. B. HARRIS.

Endorsed: Filed Oct. 25, 1888. Oliver Clifton, clerk.

And on the 29th day of October, 1888, the following order was made by said supreme court in said cause, to wit:

YAZOO & MISSISSIPPI VALLEY RAILROAD CO. *et al.* v. S. B. THOMAS, Sh'ff, *et al.* } 5857.

Argued orally by Mr. W. P. Harris, for appellants, and Mess. G. A. Wilson and Att'y Gen'l T. M. Miller, for appellees, and submitted on briefs by Mess. W. P. & J. B. Harris, for appellants, and Mess. Calhoon & Green, Hooker & Wilson, Att'y Gen'l Miller, Rush & Gardner, & Nugent & McWillie, for appellees.

20 And on the 12 day of November, 1888, there was delivered and filed in said cause an opinion by said supreme court in the following words, to wit:

YAZOO & MISS. VALLEY R. R. CO. v. S. B. THOMAS, Sh'ff *et al.* } 5857.

ARNOLD, C. J., delivered the opinion of the court:

Statutes exempting persons or property from taxation, being in derogation of the sovereign authority and of common right, are, according to all the authorities, strictly construed. As taxation is the rule and exemption the exception, the intention to create an exemption must be expressed in clear and unambiguous terms, and it cannot be taken to have been intended when the language of the statute

on which it depends is doubtful or uncertain. Legislation which relieves any species of property from its due proportion of the burdens of government must be so clear that there can be neither reasonable doubt nor controversy in regard to its meaning.

Cooley on Taxation, 2nd ed., 204.
Bailey *v.* Maguire, 22 Wall., 215.
Vicksburg, &c., R. R. Co. *v.* Dennis, 116 U. S., 665.
Frantz *v.* Dobson, 64 Miss., 631.

In the light of these principles we are unable to find anything in the charter of appellant to warrant the exemption claimed in this case. It is quite plain to us that the exemption created by section eight of appellant's charter, Acts of 1882, p. 847, was intended to commence from and after the completion of a railroad to the Mississippi river, and was to continue thereafter for twenty years if the road was completed to the river in five years from the date of the approval of the act, but liable to be diminished by whatever time beyond five years was consumed in the completion of the road to the river.

At the time appellant's charter was enacted railroads in process of construction were not taxable under the general laws of the State (Code, sec. 608), and this may account for the charter providing exemption from taxation after the completion of the road and none during the period of its construction.

Report affirmed.

Final Decree Nov. 12, 1888.

YAZOO & MISSISSIPPI VALLEY RAILROAD CO.
v.
S. B. THOMAS, Sh'ff, *et al.*
} 5857.

This cause having been submitted on a former day of this term on the record herein from the chancery court of Hinds county, 1st district, and this court having sufficiently examined and considered the same, and being of opinion that there is no error therein, doth order, adjudge, and decree that the decree of said chancery court rendered in this cause at the September term thereof, A. D. 1888, on the 14 day of September, 1888, be, and the same is hereby, affirmed; and it is further considered and so ordered, adjudged, and decreed by this court that the appellant, The Yazoo and Mississippi — Railroad Company and the obligors in the appeal bond, to wit, Illinois Central Railroad Company, the Mississippi Valley Company, P. W. Peeples, B. Lemly, and John Hart, do pay the following sums of money, as decreed in the court below, with damages thereon at the rate
21 of 5 per centum, as allowed by law, to wit: To the appellee Thomas, sheriff & tax-collector of Hinds county, for the use of the State and said county, the sum of fourteen thousand eight hundred & sixty-five & $\frac{40}{100}$ dollars, and the further sum of seven hundred and forty-three & $\frac{27}{100}$ dollars damages, at the rate of 5 per centum, as allowed by law; to the appellee Kemp, sheriff and tax-

collector of Madison county, for the use of the State and said county, the sum of eight thousand six hundred and forty-five & $\frac{89}{100}$ dollars, and the further sum of four hundred and thirty-two & $\frac{29}{100}$ dollars damages, at 5 per centum, as allowed by law; to the appellee Wyatt, sheriff & tax-collector of Holmes county, for the use of the State and said county, the sum of nine thousand six hundred & $\frac{96}{100}$ dollars, and the further sum of four hundred and eighty & $\frac{4}{100}$ dollars damages, at 5 per centum, as allowed by law; to appellee Love sheriff and tax-collector of Yazoo county, for the use of the State and said county, the sum of seventeen thousand four hundred and ninety-six & $\frac{60}{100}$ dollars, and the further sum of eight hundred and seventy-four & $\frac{83}{100}$ dollars damages, at 5 per centum, as allowed by law; to the appellee Baskett, sheriff and tax-collector of Le Flore county, for the use of the State and said county, the sum of three thousand eight hundred and seven & $\frac{39}{100}$ dollars, and the further sum of one hundred and ninety & $\frac{36}{100}$ dollars damages, at 5 per centum, as allowed by law; and to the appellee Jones, sheriff and tax-collector of Grenada county, for the use of the State and said county, the sum of two thousand two hundred and seventy & $\frac{69}{100}$ dollars, and the further sum of one hundred & thirteen & $\frac{53}{100}$ dollars damages, at 5 per centum, as allowed by law. And it is further ordered, adjudged, and decreed by this court that said above-named obligors and the appellant do pay the costs of this cause in this court and in the court below expended, &c., to be taxed, &c.

And on the 13th day of November, 1888, there was filed the petition for a writ of error, with the order for the same, the writ of error and writ of error bond, in the words and figures following, to wit:

22 UNITED STATES OF AMERICA, }
State of Mississippi. }

To the hon'l. J. M. Arnold, chief justice of the State of Mississippi:

The petitioner, The Yazoo & Mississippi Valley Railroad Company, respectfully shows that in a certain cause, wherein petitioner is appellant and Samuel B. Thomas, G. R. Kemp, D. C. Love, T. J. Wyatt, L. T. Baskett, & G. B. Jones, sheriffs and tax-collectors, appellees, in the supreme court of the State of Mississippi, in a suit which was pending therein on appeal from the decree of the chancery court of Hinds county for the first district thereof, rendered on the 7th day of September, 1888, against the said appellant and his sureties on an injunction bond for the aggregate sum of $59,821.27 dollars, & which sum is apportioned and decreed to be paid to the several defendants, tax-collectors, in several sums, respectively, as in said decree is prescribed, there was rendered, on the 12th day of November, 1888, a judgment by the supreme court of said State affirming the decree of said chancery court, with costs against petitioner; and petitioner avers that in said suit and in the proceedings on appeal there was drawn in question the validity of a law of the State of Mississippi and the validity of an authority exercised under the said State on the ground that they were repugnant to the Constitu-

tion of the United States and in denial of a right and claim founded thereon and the decision was in favor of the validity of the law of and the authority exercised under the State of Mississippi and against the claim aforesaid; and the said supreme court of the State of Mississippi being the highest court of said State in which judgment can be had in said suit, and said decree being against the right and claim which was especially set up by said petitioner in said suit, it is aggrieved thereby and prays a writ of error, with citation and supersedeas, returnable to the Supreme Court of the United States on the second Monday of October next; and as in duty bound will ever pray, &c.

YAZOO & MISSISSIPPI RAILROAD CO.,
By W. P. & J. B. HARRIS, *Attorneys.*

Let the writ of error issue as prayed for in the petition.
J. M. ARNOLD, *Judge, &c.*

Endorsed: Filed Nov. 13, 1888. Oliver Clifton, clerk, by C. C. Campbell, D. C.

Writ of Error.

UNITED STATES OF AMERICA:

The President of the United States to the honorable the judges of the supreme court of the State of Mississippi, Greeting:

Because in the record and proceedings, as also in the decree rendered therein in a suit which is in said court, before you, being the highest court of law or equity of said State in which a decision could be had in said suit between the Yazoo and Mississippi — Railroad Company and Samuel B. Thomas, sheriff and tax-collector of Hinds county; G. R. Kemp, sheriff and tax-collector of Madi-
23 son county; D. C. Love, sheriff and tax-collector of Yazoo county; T. J. Wyatt, sheriff and tax-collector of Holmes county; L. T. Baskett, sheriff and tax-collector of Le Flore county, and G. B. Jones, sheriff and tax-collector of Grenada county, wherein was drawn in question the validity of a statute of and an authority exercised under the said State on the ground of their being repugnant to the Constitution of the United States and against a claim of right founded thereon, and the decision was in favor of such their validity, a manifest error hath happened, to the great damage of the said Yazoo and Mississippi — Railroad Company, as by complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if the decree therein hath been given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the

said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States —.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 13th day of November, in the year of our Lord 1888.

JAS. M. McKEE, *Clk*,
[L. S.] Per R. H. WINTER, *D. C.*

The foregoing writ of error, with supersedeas, allowed by me this Nov. 13, A. D. 1888.

J. M. ARNOLD,
Chief Justice Supreme Court of Mississippi.

Endorsed: Filed Nov. 13, 1888. Oliver Clifton, clerk, by C. C. Campbell, D. C.

Writ of Error and Supersedeas Bond.

UNITED STATES OF AMERICA:

Supreme Court of the United States.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY
vs.
S. B. THOMAS, Sheriff and Tax-Collector of Hinds County, Mississippi; G. R. Kemp, Sheriff and Tax-Collector of Madison County, Mississippi; D. C. Love, Sheriff and Tax-Collector of Yazoo County, Mississippi; T. J. Wyatt, Sheriff and Tax-Collector of Holmes County, Mississippi; L. T. Baskett, Sheriff and Tax-Collector of Le Flore County, Mississippi; G. B. Jones, Sheriff and Tax-Collector of Grenada County, Mississippi.

Know all men by these presents that we, The Yazoo and Mississippi Valley Railroad Company, as principal, and Francis Fentress, and The Chicago, St. Louis and New Orleans Railroad Company, and The Illinois Central Railroad Company, and James Fentress, as sureties, are held and firmly bound unto S. B. Thomas, sheriff & tax-collector of Hinds county, Miss.; G. R. Kemp, sh'ff & tax-collector of Madison county, Mississippi; D. C. Love, sheriff and tax-
24 collector of Yazoo county, Mississippi; T. J. Wyatt, sheriff and tax-collector of Holmes county, Mississippi; L. T. Baskett, sheriff and tax-collector of Le Flore county, Mississippi, and G. B. Jones, sheriff and tax-collector of Grenada county, State of Mississippi, in the penal sum of seventy-five thousand dollars; for the payment of which, well and truly to be made, we bind ourselves, our successors, executors, administrators, and representatives, jointly and severally, by these presents, as witness our respective seals this the 12 day of Nov., 1888.

Whereas the above-named Yazoo and Mississippi Valley Railroad Company hath prosecuted a writ of error to the Supreme Court of

the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the State of Mississippi, on the 12 day of November, 1888, for the sum of fifty-nine thousand eight hundred and twenty-one $\frac{27}{100}$ dollars, and hath supersedeas of the execution of said judgment in the meanwhile, which is granted on the execution of this bond:

Now, therefore, the condition of this obligation is such that if the above-named Yazoo and Mississippi Valley Railroad Company shall prosecute its said writ of error to effect and answer all costs and damages on failure thereof, and shall truly pay and perform the judgment of the Supreme Court of the United States in this cause, then this obligation to be null and void; otherwise to remain in full force and virtue.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY,
By JAMES FENTRESS, *Gen'l Sol.*

Attest:
[SEAL.] R. S. CHARLES,
Act'g Secretary.

THE ILLINOIS CENTRAL RAILROAD COMPANY,
By JAMES FENTRESS, *Gen'l Sol.*

Attest:
[SEAL.] JOHN DUNN,
Ass't Secretary.

JAMES FENTRESS. [SEAL.]
FRANCIS FENTRESS. [SEAL.]
THE CHICAGO, ST. LOUIS AND NEW ORLEANS RAILROAD COMPANY,
By JAMES FENTRESS, *Gen'l Sol.* [SEAL.]
[SEAL.] HOWARD H. HENRY, *Sec't'y.*

The above bond is hereby approved by me this the 13th day of November, 1888.

J. M. ARNOLD,
Chief Justice Supreme Court of Mississippi.

Endorsed: Filed Nov. 13, 1888. Oliver Clifton, cl'k, by C. C. Campbell, D. C.

25 UNITED STATES OF AMERICA:

The President of the United States to the honorable the judges of the supreme court of the State of Mississippi, Greeting:

Because in the record and proceedings, as also in the decree rendered therein, in a suit which is in said court, before you, being the highest court of law or equity of said State in which a decision

could be had in said suit between the Yazoo and Mississippi — Railroad Company and Samuel B. Thomas, sheriff and tax-collector of Hinds county; G. R. Kemp, sheriff and tax-collector of Madison county; D. C. Love, sheriff and tax-collector of Yazoo county; T. J. Wyatt, sheriff and tax-collector of Holmes county; L. T. Baskett, sheriff and tax-collector of Le Flore county, and G. R. Jones, sheriff and tax-collector of Grenada county, wherein was drawn in question the validity of a statute of and an authority exercised under the said State on the ground of their being repugnant to the
26 Constitution of the United States and against a claim of right founded thereon, and the decision was in favor of such their validity, a manifest error hath happened, to the great damage of the said Yazoo and Mississippi — Railroad Company, as by complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if the decree therein hath been given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States —.

Witness the Honorable Melville W. Fuller, Chief Justice of
27 the Supreme Court of the United States, the 13th day of November, in the year of our Lord 1888.

[Seal U. S. Circuit Court, Southern District of Mississippi.]

JAS. M. McKEE, *C'lk*,
P'r R. H. WINTER, *D. C.*

The foregoing writ of error, with supersedeas, allowed by me this Nov. 13, A. D. 1888.

J. M. ARNOLD,
Chief Justice Supreme Court of Mississippi.

[Endorsed:] 5857. Yazoo & Miss. Valley R. R. Co. *vs.* S. B. Thomas *et al.* Writ of error. Filed Nov. 13, 1888. Oliver Clifton, cl'k, by C. C. Campbell, D. C.

28 UNITED STATES OF AMERICA,
Southern District of Mississippi:

The President of the United States to Samuel B. Thomas, sheriff and tax-collector of Hinds county; G. R. Kemp, sheriff and tax-collector of Madison county; D. C. Love, sheriff and tax-collector of Yazoo county; T. J. Wyatt, sheriff *sheriff* and tax-collector of Holmes county; L. T. Baskett, sheriff and tax-collector of Le Flore county, and G. B. Jones, sheriff and tax-collector of Grenada county, Greeting:

You are hereby cited and admonished to be and appear at a Su-

preme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed and lodged in the office of the clerk of the supreme court of Mississippi, wherein The Yazoo and Mississippi Valley Railroad Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the decree rendered against the plaintiff
29 in error in the said writ of error mentioned should not be corrected and speedy justice be done to the parties in that behalf; and you are hereby further admonished that bond for supersedeas has been duly filed with said writ of error, and therefore that you will cease and abstain from all proceedings to ex-cute said decree of the said supreme court of the State of Mississippi.

Witness the Honorable James M. Arnold, chief justice of the State of Mississippi, Nov. 13th, A. D. 1888.

[Seal Supreme Court, State of Mississippi]

J. M. ARNOLD,
Chief Justice of Supreme Court of Mississippi.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, Nov. 13, A. D. 1888.

[Seal U. S. Circuit Court, Southern District of Mississippi.]

JAS. M. McKEE, *Cl'k*,
P'r R. H. WINTER, *D. C.*

I acknowledge service of this writ & waive further execution, Nov. 13th, 1888.

T. M. MILLER,
Att'y Gen'l & Att'y of Record for Def'ts in Error.

[Endorsed:] 5857. 1st dist. Yazoo & Miss. Valley R. R. *vs.* S. B. Thomas *et al.* Citation, with waiver of att'y gen'l, for defendants. Filed Nov. 17, 1888. Oliver Clifton, clerk, by C. C. Campbell, D. C.

30 *Writ of Error.*

UNITED STATES OF AMERICA:

In the Supreme Court of the United States. October Term, 1889.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY, Plaintiff in Error,
v.
SAMUEL B. THOMAS, Sheriff & Tax-Collector, *et al.*, Defendant in Error.

Writ of error to the judges of the supreme court of the State of Mississippi.

The plaintiff in error comes, by attorney, and says that in the proceedings and decree therein of the said supreme court of the State of Mississippi in this cause there is error, in this, to wit:

1st. The said supreme court of Mississippi erred in applying the

act of the Legislature of the State of Mississippi, approved March, 1888, and other general revenue laws of the State imposing taxes on railroads to the road of the plaintiff in error, the said road being by the 8th section of its charter exempt from taxation, thereby rendering said exemption nugatory, and thus denying all effect to the charter contract in that respect, which contract is binding on the State and irrevocable.

31 2d. The said Supreme court of the State of Mississippi erred in affirming the decree of the chancery court of Hinds county, wherein and by which the errors first above assigned were likewise committed.

W. P. HARRIS,
Att'y for the Plaintiff in Error.

[Endorsed:] Sup. Court of the United States. The Yazoo and Mississippi Valley Railroad Company *v.* Samuel B. Thomas *et al.* Assignment of errors. W. P. Harris, for pl'ff in error.

32 STATE OF MISSISSIPPI:

Supreme Court.

I, Oliver Clifton, clerk of the supreme court of Mississippi, do hereby certify that the above and foregoing contains a true and correct transcript of the record and proceedings in said court in the case of Yazoo and Mississippi Valley Railroad Company *v.* S. B. Thomas, sheriff and tax-collector, *et al.*, No. 5857, together with copies of the petition for writ of error and order for same and writ of error bond, as the same appear of record and on file in my office, and that the original writ of error, citation with waiver of service, and the assignment of errors are hereto attached.

Witness my hand — the seal of said supreme court, at office, at Jackson, this January 2, A. D. 1889.

[Seal Supreme Court, State of Mississippi.]

OLIVER CLIFTON, *Clerk*,
By C. C. CAMPBELL, *D. C.*

Fees for preparing foregoing transcript, $25.00.
Paid by plaintiff in error.

OLIVER CLIFTON, *Clerk*,
By C. C. CAMPBELL, *D. C.*

Endorsed on cover: Mississippi supreme court. No. 1086. The Yazoo and Mississippi Valley Railroad Company, plaintiff in error, *vs.* Samuel B. Thomas, sheriff and tax-collector of Hinds county; G. R. Kemp, sheriff and tax-collector of Madison county; D. C. Love, sheriff & tax-collector of Yazoo county; T. J. Wyatt, sheriff & tax-collector of Holmes county; L. T. Basket, sheriff & tax-collector of Le Flore county, & G. B. Jones, sheriff & tax-collector of Grenada county. Filed February 2, 1889.